APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1958, January Session, 1959

No. 12248

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

REPUBLIC STEEL CORPORATION, *Defendant-Appellant.*

No. 12249

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

INTERNATIONAL HARVESTER COMPANY,
Defendant-Appellant.

No. 12250

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

INTERLAKE IRON CORPORATION, *Defendant-Appellant.*

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.

January 22, 1959

Before DUFFY, *Chief Judge,* MAJOR and KNOCH,
Circuit Judges.

MAJOR, *Circuit Judge.* These appeals are by Republic Steel Corporation, International Harvester

Company and Interlake Iron Corporation (referred to as Republic, Harvester and Interlake, respectively), from a decree of the district court entered June 24, 1957, by which each of the defendants is "Enjoined and Restrained from depositing or discharging and from permitting or causing directly or indirectly to be deposited or discharged into the federal channel of the Calumet River, a navigable stream of the United States, within the territorial jurisdiction of this court, between Stations 105 and 300, industrial solids, including flue dust, without first obtaining a permit from the Chief of Engineers of the Department of the Army of the United States of America, providing for satisfactory conditions for the removal of such future deposits and discharges * *." Each defendant is "enjoined and ordered to restore to a depth of 21 feet below low water datum for Lake Michigan the federal channel of the Calumet River * * between Stations 105 and 300, by dredging within a reasonable time not exceeding one year the industrial solids or wastes, including flue dust" in said Calumet River. Republic is required to remove 36.78% of 81.5%; Harvester, 36.31% of 81.5%, and Interlake, 26.91% of 81.5% "of the aggregate of the industrial solids or wastes, including flue dust, found in the federal channel of the Calumet River * *."

The decree was predicated upon an opinion, findings of fact and conclusions of law, entered by the district court following a protracted hearing. *United States v. Republic Steel Corporation, et al.*, 155 F. Supp. 442. These reported findings to which we make reference obviate the necessity for a detailed statement of facts.

The following, taken from the findings, will suffice for the purpose of bringing into focus the issues which we think are decisive. The Calumet River at the point where it connects with Lake Michigan is located

approximately 11½ miles south of the Chicago Harbor, which is directly east of the Loop in the City of Chicago, Illinois, and is used by a large number of lake and foreign ships. It extends from Lake Michigan to the junction of the Little Calumet and the Grand Calumet Rivers, and leads via canals to the Illinois River and on to the Mississippi. The natural flow of the Calumet River which was toward the lake has been reversed by the Chicago Sanitary District in order to carry polluted waters away from the lake. Hence, the normal direction of the river flow since 1922 has been away from Lake Michigan, with the exception of short periods of excessively heavy rainfall.

The Calumet River is marked at 100-foot intervals, called "stations." Station 0 is near the Elgin, Joliet and Eastern Railroad bridge and Station 300 is just north of 130th Street. The river channel from Station 0 to Station 300 has a minimum width of 200 feet. The Corps of Engineers of the Department of the Army has been designated by Acts of Congress to maintain in the Calumet River a federal channel to the minimum depth of 21 feet, for the purpose of navigation. Such channel has been continuously maintained since the year 1881.

Harvester is located on the west bank of the river, with a river frontage extending from about 108th to 111th Street. Interlake is located on the east bank of the river, from about 107th to 111th Street, and on the west bank of the river from about 111th to 114th Street. Republic is located on the east bank and extends from 111th to about 122nd Street. All three defendants are and have been for many years engaged in the production of iron and related products. In such production they use iron ore, limestone and coke to produce iron. Each defendant produces coke from coal. Republic and Harvester each produces approx-

imately 500,000 gross tons of iron and 1,300,000 gross tons of steel ingots per year, and Interlake produces approximately 450,000 gross tons of iron per year but no steel ingots.

The trial court found:

> "As a result of the production of iron by all three defendants, certain industrial wastes are created, consisting of flue dust containing a high percentage of iron oxide, slag, calcined lime and other solids. In the production of coke and iron and steel products, additional wastes are created, such as coke, breeze, mill scale, and other solids from the many and varied plant operations."

Defendants in their operations pump water in vast amounts from the river. The amount taken from the river and used by the defendants each month is approximately as follows: Republic, 2,500,000,000 gallons; Harvester, 2,655,000,000 gallons, and Interlake, 1,031,120,000 gallons. This water after use is returned to the river through sewers maintained by the defendants. Republic has eight, Interlake five and Harvester fourteen sewers, all emptying into the river. Each of the defendants maintains and operates a tank-type settling basin designed to recover the fine flue dust contained in the water after its use. However, some of this dust escapes and is washed into the sewer and on into the river. There is some water which flows directly into the river through sewers, which has not passed through a settling basin. Expert witnesses testified as to the analysis of samples taken from defendants' sewers and from the river bottom in the vicinity of defendants' mills which showed a high percentage of material assignable to iron and steel mill origin. Much of the solids, generally called industrial

waste, is extremely fine, not detectable by the naked eye or even by microscopic examination.

The original complaint filed by the government prayed for a prohibitory as well as a mandatory injunction to compel the defendants to restore the bed of the Calumet River "in front of, or abutting on, their mills or establishments to the original channel depth of twenty-one (21) feet." After the trial had been in progress for almost a month, the government, over objections by the defendants, was permitted to amend its complaint. Such amended complaint prayed for a mandatory injunction compelling the defendants to dredge not only the channel near their plants but all of the channel between Stations 105 and 300, to the original depth of 21 feet. The decree requires the defendants to dredge the channel for the distance and in the manner prayed for in the amended complaint, which means that defendants are required to dredge not only the portion of the channel adjacent to their plants but for a considerable distance both up and down stream. As to Harvester, it includes one-third mile upstream and almost three miles down.

The complaint alleged:

> "8. The continued discharge and deposit by defendants, and each of them, of industrial solids and flue dust into the channel of the Calumet River is unlawful and in violation of Sections 403 and 407 of Title 33 of the United States Code.
>
> "9. The continued discharge and deposit by the defendants, and each of them, of industrial solids and flue dust into the channel of the Calumet River, between approximately Stations 105 and 300, constitutes an obstruction of a navigable water of the United States of America, and constitutes and creates an interference with and an

obstruction to interstate and foreign commerce and navigation, to the detriment and injury of the public interest."

The court in its conclusions of law stated:

"This action was properly brought because the defendants are discharging industrial solids into the Calumet River, in violation of the Federal Statutes, 33 U.S. Code, Secs. 403, 407, and this constitutes an interference with navigation and commerce."

The government in its brief before this court raises the following issue:

"Is the government entitled to an injunction as a matter of law predicated upon the provisions of 33 U.S.C. 403 and 407?"

The government in its summary of argument states:

"The evidence clearly establishes obstruction of the Calumet River by the defendants herein by the practice of discharging industrial solids consisting of flue dust and other materials into the river."

And further:

"The violations by the defendants of sections 403 and 407 of Title 33, United States Code, gives rise to the cause of action for injunctive relief by the United States."

Thus, it appears plain, as was conceded by government counsel in oral argument before this court, that the case was tried and decided on the basis that defendants were and had been violating Secs. 403 and 407,

and that the right of the government to injunctive relief stemmed from the authority contained in those sections. Even so, the government in this court also raises the further issue:

> "Does the United States as a sovereign have the inherent constitutional right to apply to the courts for removal of obstructions to commerce, including obstructions of navigable streams?"

In 1896, Congress directed the Secretary of War to prepare a compilation of all general laws previously enacted by Congress for the maintenance, protection and preservation of federal navigable waters and transmit the same to Congress together with his recommendations for "their revision, emendation or enlargement" as he should deem "most advantageous to the public interest." Act of June 3, 1896, 29 Stat. 202, 234. The Secretary's compilation and recommendations were transmitted to Congress on February 10, 1897. H.Ex.Doc. 293, 58th Cong., 1st Sess. After long consideration, Congress enacted the Rivers and Harbors Act of March 3, 1899, including Sec. 10 (Sec. 403 U.S.C.A.) and Sec. 13 (Sec. 407 U.S.C.A.) as a comprehensive and logically arranged statement of all general laws for the maintenance, protection and preservation of navigable waters, and specifically repealed all inconsistent prior general laws or parts thereof. *United States* v. *Wilson* (C.A. 2), 235 F.2d 251, 252-3.

Section 403 enumerates three classes of prohibitions or violations, as follows:

> 1. "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited."

2. "* * it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any * * navigable river * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army."

3. "* * it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any * * channel of any navigable water of the United States, unless the *work* has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." (Italics supplied.)

Section 407 relates to the deposit of refuse in navigable waters and provides, so far as here material:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever *other than that flowing from streets and sewers and passing therefrom in a liquid state*, into any navigable water of the United States * *." (Italics supplied.)

The section further provides:

"* * That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be

prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

It is pertinent to observe that by clause 1 of Sec. 403 an obstruction is prohibited "not affirmatively authorized by Congress." In contrast, the building of a structure described in clause 2, and the excavation or fill described in clause 3 of the same section, are made unlawful unless recommended by the Chief of Engineers and authorized by the Secretary of the Army. Similarly, the Secretary of the Army is authorized, under the conditions set forth, to permit the deposit of refuse otherwise made unlawful by Sec. 407.

Section 406 provides penalties for the violation of the several clauses of Sec. 403. It provides that every person or corporation violating any of such provisions "shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court." The section further provides that the removal of any structures or parts of structures erected in violation of the provisions of Sec. 403 may be enforced "*by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.*" (Italics supplied.)

Section 411 provides penalties for the violation of Sec. 407. It provides that every person or corporation

violating such section "shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the descretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction."

It is pertinent to note at this point, although perhaps more relevant to our subsequent discussion relative to the right of the government to injunctive relief, that the sole statutory basis for such relief for a violation of any of the provisions of either Sec. 403 or 407 is that contained in Sec. 406. Such right is specifically limited to "the removal of any structures or parts of structures" erected in violation of clause 2 of Sec. 403. Prior to a discussion of that phase of the case, however, we shall consider whether defendants have violated any of the provisions of Secs. 403 and 407. Notwithstanding that the two sections of the statute in controversy enumerate separate and distinct offenses, the government deals in a wide range of generalities. It argues that the defendants, within the terms of Sec. 403, created an unlawful obstruction, and if not that, an unlawful fill, and if neither of those, unlawfully deposited refuse matter in violation of Sec. 407. It appears, however, from what we have heretofore quoted from its complaint and summary of argument, that its principal reliance is upon an unlawful obstruction.

The government makes an appealing argument that any obstacle to navigation in the Calumet River should be removed at the expense of its creator and not at that of the government. Such argument might appropriately be made to Congress, but it is of little,

if any, aid in construing the enactment before us. It must not be overlooked that the sections of the statute in controversy have remained as enacted for a period of almost sixty years, and that they should be construed in the light of the facts and circumstances then existing. *Great Northern Railway Co.* v. *United States,* 315 U.S. 262, 273; *United States et al.* v. *Missouri Pacific Railroad Co.,* 278 U.S. 269, 278. Congress no doubt possesses the power to protect navigable waters of the country, which it can exercise by its own enactments or by delegation of authority to the War Department and the Corps of Army Engineers. In dealing with navigable rights, Congress must take into consideration the interests of those who own and possess riparian rights. We apprehend that drawing the line between the two interests, that is, those of navigation and the riparian land owner, is difficult. That must have been so when the sections in controversy were enacted in 1899, and, considering the growth and development of the country, even more so today.

The question as to whether defendants have violated Secs. 403 and 407, or either of said sections, must be resolved without the aid of controlling authority, although there are cases which throw some light, the most important of which is that of *United States* v. *Wilson,* 235 F.2d 251. In that case an action was brought by the United States to compel the defendants to remove a sunken barge from a navigable stream. After holding that Sec. 10 (Sec. 403 U.S.C.) of the Act of 1899 repealed all previous laws inconsistent therewith, the court held that the government was not entitled to injunctive relief. Relative thereto the court stated (page 253):

> "As to this, the only section of the later Act which contains injunctive provisions possibly ap-

plicable here is Sec. 12, 33 U.S.C.A. Sec. 406. The injunctive power so provided is expressly limited to 'the removal of any structures or parts of structures erected in violation of the provisions of Secs. 9, 10 and 11 of the 1899 Act. 33 U.S.C.A. Secs. 401, 403 and 404. Clearly, our sunken barge is not a structure prohibited by Secs. 9 and 11 which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in Sec. 10, 33 U.S.C.A. Sec. 403. *In re Eastern Transportation Co.*, D.C., 102 F. Supp. 913. That section prohibits, first 'The creation of any [unauthorized] obstruction * * to the navigable capacity' of United States waters, and, second, the building of 'any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other *structures*' in any port, etc. (Emphasis supplied.) It thus makes a plain distinction between obstructions' and 'structures.' Section 12, 33 U.S.C.A. Sec. 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by Sec. 10, 33 U.S.C.A. Sec. 403."

In *United States* v. *Brazoria County Drainage Dist. No. 3*, 2 F.2d 861, the government sought to enjoin and abate the operation of a drainage district which discharged into a navigable waterway. The deposit of silt from such drainage district was greater than normal because of faulty construction of the ditch. The government relied upon the alleged violation of Sec. 403 and upon the remedy provided by Sec. 406. In an opinion by Judge Hutcheson (then a District Judge, at present Chief Judge of the Fifth Circuit), it was held that there was no violation of Sec. 403, and in-

junctive relief was denied. In doing so the court stated (page 862):

> "That these statutes prohibit the erection of structures in navigable streams, unless the plans therefor have been approved by the War Department and authorize the removal of such structures placed without such approval, is plain. That they do not apply to washing or erosion caused by drainage, and that the prohibitory features of the statutes cannot be distorted so as to cover the operations of drainage districts, is equally plain."

In *United States* v. *Burns*, 54 Fed. 351, the court granted a motion to quash a count of an indictment which alleged a violation of Sec. 10 of the Rivers and Harbors Act of 1890, a predecessor of Sec. 403, which prohibited "the creation of any obstructions, not affirmatively authorized by law, to the navigable capacity of any" navigable waters. The alleged violation consisted of throwing and placing rafts, logs, sticks, boats and other objects in a navigable river. In holding the section inapplicable the court stated (page 363):

> "I think that the obstructions contemplated by the tenth section—those that have not been affirmatively authorized by law, and are therefore prohibited—are such obstructions as are permanent in their nature, as are created for special purposes, by the usual modes of construction. I cannot agree with the district attorney in his construction of the statute, and I cannot hold that it was the intention of Congress, by this tenth section, to prohibit the floating of rafts, logs, timber, boats, and vessels, loose and adrift, in and upon the navigable waters of the United States."

As shown, the amended complaint alleged that the discharge and deposit by defendants of industrial solids and flue dust in the channel of the Calumet River constitutes an "obstruction" of navigable water. The decree and the principal argument here rest upon the same premise. The government in its brief states:

> "The proof in this case is clear that the deposits in question create an obstruction to the navigable capacity of the Calumet River, a navigable water of the United States."

Assuming that defendants' activities result in an obstruction in fact, it does not follow that it is an obstruction in contemplation of law. *Pennsylvania* v. *The Wheeling and Belmont Bridge Co. et al.*, 59 U.S. 421, 430, 432, 15 L.Ed. 435, 437; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 64. The government's contention that the deposit of material in the Calumet River constitutes an obstruction in contemplation of law, that is, in violation of Sec. 403, is inconsistent with the relief sought and that granted because the government sought and obtained an injunction preventing the deposit complained of without a permit from the Department of the Army and requiring its removal in a manner satisfactory to the same governmental agency. Congress did not give the Army or its Engineers authority to authorize, sanction or recommend an obstruction which it had prohibited. Such was made lawful only when "affirmatively authorized by Congress." If the words, "any obstruction," are given their broad, inclusive scope, which the government would have us do, there would be no reason for the second and third clauses of Sec. 403. For that matter, there would be no reason for Sec. 407. Everything which might constitute an obstruction in fact would also constitute

an obstruction in contemplation of law and could be lawful only when "affirmatively authorized by Congress."

The court, in *State of Wisconsin et al.* v. *State of Illinois et al.*, 278 U.S. 367, must have had this thought in mind. Referring to Sec. 10 (403) the court stated (page 413):

> "If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended." *

It is too plain to require discussion that defendants did not violate clause 2 of Sec. 403, which makes it unlawful "to build or commence to build * * structures in a * * navigable river." (See *United States* v. *Wilson*, 235 F.2d 254, above cited, and the quotation therefrom.) The government does not contend otherwise.

The government in its brief, as to clause 3 of Sec. 403, states:

> "While Section 403, Title 33 U.S.C.A. prohibits the building of obstructions of a permanent nature nevertheless it also provides that no one shall '* * fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States.'"

It would appear by this statement that the government is doubtful of its premise that defendants' deposits in the channel constituted an obstruction such as is prohibited by the first clause of the section. Moreover, in the quotation important language is omitted. The quotation should commence, "excavate or fill," and should conclude, "unless the *work* has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." (Italics supplied.) Do the deposits made by the defendants over a course of years, which progressively build up so as to result in an obstacle to navigation, constitute a "fill" within the contemplation of this clause? The question has never been considered by a court, so far as we are aware. In our view, however, giving effect to the ordinary meaning of the words employed, the question must be answered in the negative. Defendants, in pumping water from the channel, remove much material which is afterward returned in part in its water discharge. It would seem quite unreasonable to refer to such removal as an excavation and almost as unreasonable to think of the discharge as a fill. More than that, it appears that Congress placed its own definition upon the words, "to excavate or fill," when it referred to such operations as "the work," which might be recommended and authorized by the specified federal officials. It would be a strained and unrealistic appraisal of the language employed by Congress to hold that defendants by depositing material in the channel were engaged in a "work" which might have been recommended prior to beginning. It seems more reasonable to believe that Congress had in mind an operation the effect of which on navigation could be determined in advance so that the designated federal officials could approve or disapprove.

This brings us to Sec. 407 (heretofore quoted), which makes unlawful the deposit in navigable waters of "any refuse matter of any kind or description whatever *other than that flowing from streets and sewers and passing therefrom in a liquid state.*" (Italics supplied.) As previously noted, the sole penalty provided for a violation of this section is found in Sec. 411 and consists of punishment by fine or imprisonment. Obviously, the pertinent question is whether the deposits were "refuse matter * * other than that flowing from streets and sewers and passing therefrom in a liquid state." It is evident that if such deposits come within the scope of the exception, they are excluded from the terms of the section.

The trial court found:

> "Although sewer outfalls are emptying many fine particles of less than 325 mesh, nevertheless those fine particles tend to flocculate into larger units, that is, they are attracted and held together by electrical forces and tend to deposit loosely on the river bottom in a form that could be represented on a larger scale by a pile of matchsticks dropped at random. Larger and heavier particles tend to fall into the settled flocculated material without increasing the volume. A study of the solids found in various shoals in the vicinity of the mills showed a high accumulation of iron oxide. This is primarily due to industrial waste coming from the three defendants' mills."

The court further found:

> "These solids are in excess of those being transported in the water at the time it is being pumped out of the river by the defendants. The solids being deposited in the Calumet River from the

sewers of the defendants are being transported by suspension in the water and are not in solution or in a liquid state."

The proof relative to the contents of the water flow from the sewers of Interlake appears to be typical. An analysis disclosed that the effluent from its sewers averaged more than 99-½% water. Analyses of the samples from three sewers showed that from 63 to 85.9% of the material in suspension passed through a 325 mesh screen or was smaller than 44 microns. The analysis of material in suspension flowing from another sewer showed that 90.5% was finer than 62½ microns, and that 80.3% was finer than 31 microns. Pelto, an expert witness for the government, testified that a micron is a millionth of a meter, a thousandth of a centimeter, and that he did not know "the smallest diameter in micron that would be visible to the naked eye." He was asked, "What is the smallest diameter in microns that you could see with the microscope that you used?" He answered, "We can see ordinarily pretty well down to about one micron or a little bit less, down to about the wave length of light, where we can draw some conclusions of the material." Einstein, another government expert witness, expressed the opinion that some of the particles in controversy could be detected by a microscopic examination but that "there are lots of particles in there that are too small to be seen under a microscope and those particles are the worst offenders because they make the strongest and the fluffiest of the deposits."

As previously shown, both Secs. 407 and 403 were enacted in 1899, and should be interpreted in the light of the environment of that period. In 1900, out of a total urban population of more than 30 million, the

aggregate of such population which provided any degree of treatment for its domestic and trade wastes was about one million. In other words, less than 3½% of such population provided for such treatment. *Modern Sewage Disposal* (1938), p. 13 (published by the Federation of Sewage and Industrial Waste Associations, Langdon Pearse, Editor, 50th Anniversary Book, Lancaster Press, Inc.). The domestic and trade wastes of the remaining urban communities were discharged without treatment into the nearest body of water and carried large quantities of solids in suspension or in unstable or impermanent solution. Throughout this period, a statute which prohibited the discharge of street runoffs, or of domestic or trade wastes flowing from sewers which carried any solids in suspension or impermanent solution, would have outlawed the method universally used for the disposal of such wastes. We agree with defendants that there should not be attributed to Congress an intent to produce such a drastic change in the absence of clear and compelling statutory language.

As noted, defendants each maintain settling basins and other devices for the purpose of capturing from their sewer outlets as much as possible of this so-called industrial waste. There is some variance in the testimony as to the extent of their success in this respect. We think it fair to assume from the proof that the flow from defendants' sewers contains less than 1½% of industrial waste. All the waste which escapes is in particles so extremely fine that they cannot be detected with the naked eye; in fact, much of it is not detectable under microscopic examination.

Legislation previous to the Act of 1899 throws some light on what Congress intended. The first general Act was that of 1890, which prohibited dumping into navigable waters "any ballast, stone, slate, gravel,

earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind * * which shall tend to impede or obstruct navigation." In Sec. 407 of the Act of 1899, now under discussion, Congress omitted the enumeration of specific forms of debris or waste and in general terms prohibited the discharge or deposit of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." Thus, Congress in the Act of 1899 failed to specify the items as it had previously done but covered the same in general language, and at the same time excluded "that flowing from streets and sewers and passing therefrom in a liquid state."

Defendants argue, we think with plausibility, that Congress inserted the exception for the purpose of making it clear that the statutes would not outlaw the practices then in existence with respect to the disposal of street runoffs and of domestic and trade wastes flowing from sewers into navigable streams. This view is fortified when we contemplate the consequences of a contrary interpretation which would make the exception meaningless. At any rate, this would be the result of holding the exception without application solely on the basis that the water flowing from defendants' sewers contained particles which made up an infinitesimal amount of the whole and which were so tiny that they could be detected only with great difficulty. Such an interpretation would limit the exception to water free from all sedimentation or solids however small or inconspicuous they might be. It is not reasonable to believe that Congress intended such an incongruous result when it excepted from the section refuse matter flowing from streets and sewers and passing therefrom in a liquid state.

Here again, the government's argument is directed at what the law should be or what the government would like it to be rather than at what it is. For instance, the government in its brief states:

> "Interlake points out that throughout our history navigable waters have been used not only for navigation but also for manufacturing, for domestic purposes, and for the disposal of domestic and industrial trade waste.' This may have been true in the past and may still be true in certain areas of the country. However, when the surrounding development reaches a certain point domestic wastes, such as sanitary sewage, are excluded from all bodies of water, if they have not received clarifying treatment. In this view reference may be made to the Interstate Compacts to control pollution of the Ohio river system and to the streams of the eastern section where local enforcement has forced the coal mining institute to clean up the public nuisance created by the discharge of waste water into the local streams."

We are not able to discern how restrictions imposed by state and other local agencies to prevent pollution of navigable or non-navigable water, or the discharge of industrial waste into the same, under present-day conditions has any bearing upon or furnishes any aid to the construction of a statute enacted almost sixty years ago. Moreover, it appears that the Interstate Compact to which the government refers provided that water shall be so treated "as to provide for substantially complete removal of settleable solids, and the removal of not less than 45% of the total suspended solids." See *Dyer* v. *Sims*, 341 U.S. 22, 24. This appears to recognize the obvious, that is, that industrial

or domestic wastes or street runoffs are never free from solids carried in suspension or in unstable solution.

In our judgment, defendants' activities do not constitute a violation of Sec. 407, by reason of the exception contained therein. Even so, we think the government's contention as it relates to Sec. 407 is more plausible than its contention as it relates to the provisions of Sec. 403. Moreover, the government's strong reliance upon Sec. 407 fortifies our view, previously expressed, that there was no violation of Sec. 403. It seems certain that if defendants violated Sec. 407 by the deposit of refuse under the circumstances therein set forth, they were clearly not in violation of Sec. 403 by the creation of an obstruction, by the building of a structure or by the creation of a fill.

In view of our conclusion that the activities of defendants under attack do not constitute a violation of any of the provisions of Sec. 403, or a violation of Sec. 407, there may be no necessity to proceed further. However, in recognition of the fact that the conclusions which we have reached, or some of them, might be erroneous, and as a matter of precaution, we shall consider the government's asserted right to injunctive relief. Such discussion, of course, must be predicated upon the assumption, contrary to what we have held, that the government has shown a violation of Secs. 403 and 407, as pleaded and as found and concluded by the district court. In this connection it is pertinent to observe that no statutory basis for injunctive relief is pointed out either in the findings, conclusions or decree of the district court, or in the brief and argument presented to this court. That Congress has not only failed to authorize such relief but has by strong implication excluded the same is made clear from an examination of the relevant statutory provision

As is apparent from our previous discussion, the government takes no firm stand on the precise violation upon which it relies. It wavers between its various theories that defendants have violated clause 1 of Sec. 403 by the creation of an obstruction, or clause 3 of the same section by the creation of a fill, or Sec. 407 by the deposit of refuse. At no place, however, does the government contend that defendants have violated clause 2 of Sec. 403 by building or commencing to build "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures." Sec. 406 provides penalties of fine or imprisonment for the violation of each of the provisions of Sec. 403, and Sec. 411 provides similar penalties for a violation of Sec. 407. The sole provision authorizing injunctive relief for a violation of any of the provisions of Sec. 403 or Sec. 407 is that found in Sec. 406, which provides:

> "* * And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections [referring among others to Sec. 403] may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

As already noted, Secs. 403 and 407, as well as Secs. 406 and 411 (the penalty sections), were all enacted at the same time as parts of the comprehensive Act of March 3, 1899. It is hardly conceivable that Congress intended to authorize injunctive relief for all violations when it expressly limited such relief to a single definitely described form of violation. It is more reasonable to think that Congress deliberately

withheld the right to such relief in all instances other than for the violations set forth in clause 2 of Sec. 403.

We have previously noted the opinion of the Second Circuit in *United States* v. *Wilson*, 235 F.2d 251, which supports this analysis and interpretation of the provisions in controversy. We have cited and quoted from this opinion and need not repeat. It is sufficient to again state that the court held that the government was not entitled to an injunction to compel the removal of a sunken barge, on the ground that Congress had authorized injunctive relief only for a violation of clause 2 of Sec. 403, and that a barge was not a structure as enumerated in that clause. This is the only case, so far as we are aware, which has considered and decided the precise question under discussion. The government makes no mention of this case in its brief.

The Act of 1890 was repealed by the Act of 1899. A comparison of the two Acts reveals a significant circumstance bearing upon the intent and purpose of Congress. Sec. 10 of the repealed Act (see *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 20 S.C. Rep. 343) provided among other things "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, * * is hereby prohibited." This section provides a penalty of fine and imprisonment for a violation of the prohibition and that "such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States." This right to an injunction to require removal of an unlawful obstruction, contained in the Act of 1890, was omitted from the Act of 1899. Thus, Congress by the latter enactment withdrew the

right to obtain the removal of an obstruction by injunction, a right which it had bestowed in its enactment of 1890. We have no way of knowing, in fact need not be concerned with the motivation which caused Congress by the 1899 Act to withdraw the right to injunctive relief, which it had provided for in the Act of 1890.

In *Wheeler* v. *Greene*, 280 U.S. 49, 51, the court, referring to a similar situation, stated:

> "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed."

This appears an appropriate point to refer to two of the cases relied upon by the government in support of its asserted right to injunctive relief. *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 20 S.C. Rep. 343; *United States* v. *Rio Grande Dam & Irrigation Co. et al.*, 174 U.S. 690, 19 S.C. Rep. 770.) As shown, *supra*, the court in the *Bellingham* case relied upon the Act of 1890, which expressly provided for injunctive relief. The *Rio Grande* case falls in the same category. In the latter case the court stated (S.C. Rep. page 777):

> "The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity, under the direction of the attorney general of the United States, and it was in pursuance of this clause that those proceedings were commenced."

It appears reasonably certain that the court in each of those cases would have reached a different result

absent an express statutory provision authorizing injunctive relief. In fact, it is not difficult to visualize that neither action would have been commenced without such a provision.

The government cites other cases in support of its statutory right to injunctive relief, including *Sanitary District of Chicago v. United States*, 266 U.S. 405, and *People of State of New York v. State of New Jersey*, 256 U.S. 296. A detailed analysis and discussion of these cases would unduly prolong this opinion. If the construction and interpretation which we have placed upon Secs. 403 and 407 is correct, none of these cases has any application. The case which perhaps makes the nearest approach is the *Sanitary District of Chicago* case. The government in its brief quotes from this case as follows (page 425):

> "The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes."

This statement must be considered in connection with the nature of that case. The action was brought by the United States to enjoin the Sanitary District of Chicago from the withdrawal of water from Lake Michigan in excess of an amount authorized by the Secretary of War. The case involved a conflict between State and Federal power, and it was held that the United States in the exercise of its sovereign power had standing to enforce by injunctive relief treaty

obligations to a foreign power, to protect its sovereign interest in the Great Lakes and to prevent a State from interfering with the constitutional power of the United States because "in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all." Thus, the situation before the court in that case was far different from that of the instant case. It is significant to note that the Second Circuit, in *United States* v. *Wilson*, 235 F.2d 251, cited and quoted from above, made no mention of the *Sanitary District* case, even though it was, so we are advised, cited by the government in its brief.

Moreover, it appears that the Supreme Court later had some misgiving as to its holding, certainly as to its reasoning, in the *Sanitary District* case. In *State of Wisconsin et al.* v. *State of Illinois et al.*, 278 U.S. 367, decided some four years later, the court, referring to its decision in the *Sanitary District* case, stated (page 414):

> "The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed * *."

In *People of State of New York* v. *State of New Jersey; supra*, an original action was commenced in the Supreme Court by the former State to enjoin the latter from discharging a large volume of sewage into Upper Bay, a part of New York harbor. The court sustained the right of the Federal government to intervene, upon allegations that the sewage discharge would interfere with navigation and "that practically irreparable damage will be caused to the extensive

properties owned by the government adjacent to the bay." The fact that the government was permitted to intervene in an action pending before the Supreme Court furnishes no support, in our view, for its right to commence an original action for injunctive relief in the district court. . .

As previously noted, this case was pleaded, tried and decided upon the basis that the government was entitled to injunctive relief as a matter of statutory right. Here, however, we are confronted with the argument, advanced for the first time so far as we are aware, that the government, irrespective of statutory power, is entitled to the relief sought and allowed. The government in its brief states:

> "The United States as an attribute of soveriegnty has the inherent and constitutional right and power to regulate commerce, particularly navigation and navigable streams. This is in addition to the statutory power and right of the United States with respect to the shoaling of the river bed here in question (33 U.S.C. 403, *et seq.*). It is our further position, however, that independent of the statutes, the government would have a right to the injunction and the decrees herein granted."

We do not agree with this contention. Undoubtedly the Federal government has the constitutional right and power to regulate commerce, including that concerned with navigation and navigable streams. Even so, we do not understand that the commerce clause of the Constitution is self-executing. Here, we have a situation where Congress, acting under its constitutional power, has enacted a statute covering and controlling the subject matter. The government, in our view, has only such rights as Congress has provided.

The government cites what it refers to as the land-

mark case of *Gibbons* v. *Ogden*, 22 U.S. 1, 6 L.Ed. 1, in support of the proposition that navigation and navigable streams are subject to the commerce power of the United States. That case also supports the proposition that such power can only be exercised by Congress. In *Willamette Iron Bridge Co.* v. *Hatch, et al.*, 125 U.S. 1, 8 S.C.Rep. 811, 815, the court stated:

> "The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers * * *. * * * There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states." (Cited and quoted with approval in *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 20 S.C.Rep. 343, 345.)

In *United States* v. *Rio Grande Dam & Irrigation Co. et al.*, 174 U.S. 690, 19 S.C.Rep. 770, 777, the court, referring to the Act of 1890 (heretofore discussed), stated:

> "It was an exercise by congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute * * provide for the mode of asserting that control."

In *United States* v. *Chandler-Dunbar Water Power Co., et al.*, 229 U.S. 53, 33 S.C.Rep. 667, 672, the court stated:

> "So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control."

Upon this phase of its argument the government quotes at length and places great reliance on *In Re Debs,* 158 U.S. 564, 15 S.C.Rep. 900. We have read this opinion and are of the view that it has no application to the instant situation. The government's own appraisement of the opinion discloses its irrelevancy. Referring to that case, the government in its brief states, "The cited opinion held that Congress has full power over channels of interstate commerce and the regulation of the mails." That is a far cry from the government's contention here that it has the inherent right, independent of congressional enactment, to injunctive relief. Thus, the government's concession concerning the *Debs* case is consistent with our view that the government has only such rights as are expressly provided by statute.

The government, as previously noted, makes an appealing argument that defendants should be required by a mandatory injunction to remove from the Calumet River any and all deposits for which they are responsible. It is an argument, however, which in our judgment should be made to Congress rather than to a court. As stated in *Addison et al.* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 617:

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it

is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."

We find no occasion to state or discuss the numerous other grounds upon which defendants attack the validity of the decree. We hold there is no legal basis, statutory or otherwise, upon which the government is entitled to injunctive relief.

The decree appealed from is reversed and the cause remanded, with directions that the complaint be dismissed.

Judgment

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, January 22, 1959

Before Hon. F. Ryan Duffy, *Chief Judge;* Hon. J. Earl Major, *Circuit Judge;* Hon. Win G. Knoch, *Circuit Judge*

Nos. 12248, 12249, 12250

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, INTERLAKE IRON CORPORATION, *Defendants-Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court

for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decree of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, AND THAT THIS CAUSE BE, AND IT IS HEREBY, REMANDED TO THE SAID DISTRICT COURT WITH DIRECTIONS THAT THE COMPLAINT BE DISMISSED, IN ACCORDANCE WITH THE OPINION OF THIS COURT FILED THIS DAY.

APPENDIX B

Section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454, provides:

> SEC. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented

and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U.S.C. 403, provides:

> Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Section 12 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-1152, 33 U.S.C. 406, provides:

Sec. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

Section 13 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1152, 33 U.S.C. 407, provides:

Sec. 13. That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or

cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Section 17 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1153, 33 U.S.C. 413, provides:

Sec. 17. That the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter desig-

nated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under the provisions of this Act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

UNITED STATES OF AMERICA,
Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 859.

UNITED STATES OF AMERICA,

Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION.

OPINIONS BELOW.

The memorandum of the District Court (App. 91-97) is reported at 154 F. Supp. 442 together with the findings of fact, conclusions of law and decree. The opinion of the Court of Appeals is reported in 264 F. 2d 289.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the discharge of industrial wastes from respondent's plants into the Calumet River, in the amounts and in the manner as shown by the record in this case, is unlawful under federal statutes and law.

2. If so, whether the United States is entitled to mandatory and prohibitory injunctions under federal law.

3. Whether certiorari should be granted to review issues neither argued below nor fairly presented by the record. The petition asserts for the first time that section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454, has not been repealed and affords a basis for the equitable relief granted by the trial court. The petition is likewise the first intimation that petitioner claimed the right to any relief other than injunctive relief.

4. Whether the decree of the District Court complied with FRCP 65(d) and basic equitable principles. The Court of Appeals did not find it necessary to consider this question, but respondent contends that a determination thereof is relevant to the question whether certiorari should be granted.

5. Whether the decree was supported by legally competent evidence. The Court of Appeals did not find it necessary to pass upon this question, but its determination is relevant to the question whether certiorari should be granted.

STATUTES AND RULES INVOLVED.

Sections 10, 12, 13 and 17 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-1153, 33 U. S. C. §§ 403, 406, 407, 413, are set forth in appendix B to the petition (pp. 33a-36a).

It is this respondent's position that section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat.

426, 454, also printed in the appendix to the petition, at p. 32a, was repealed by the 1899 statute. Petitioner asserted the 1890 statute as a basis for relief for the first time in its petition for certiorari.

The 1890 statute was repealed by section 20 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1154-1155), the last paragraph of which reads as follows:

> "That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed: *Provided*, That no action begun, or right of action accrued, prior to the passage of this Act shall be affected by this repeal."

Concerning its contention that section 10 of the 1890 statute has been repealed, respondent Harvester cites 1 U. S. C. 204, which reads in part as follows:

> "In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—
>
> (a) United States Code.—The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States."

Petitioner also cites FRCP 54(c) (Pet. 2) for the first time during this litigation. It is respondent's position that this rule has no application to the present case.

Respondent relies (*inter alia*) upon Rule 65(d) FRCP, which is:

> "Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

SUPPLEMENTARY STATEMENT.

The three respondents operate iron or steel mills on the banks of the Calumet River. In the process of manufacturing steel or iron, they use large quantities of water which is pumped out of the Calumet, used in various industrial operations such as the washing of gases from the blast furnaces and cooling, and then flows back into the river. Most of the cooling water is carried in a closed circuit so that it neither gains nor loses sediment in the process. All of the wash water is run through settling basins where most of the solid matter picked up in the plant is removed.

United States Steel Corporation and Youngstown Sheet and Tube Co. operate steel mills at the mouth of the river upstream from respondents and likewise use vast quantities of water for cooling and washing. These companies dredge immediately adjacent to their plants, but so far as the record shows the Government does not contend that any of the material in their sewer effluents is carried downstream. The record shows that the river carries almost the same amount of suspended solids at the 106th Street bridge, upstream from respondents' plant, as it does downstream from all respondents' plants. See Republic's Exhibits 143, App. 2076, 2412; and 146, App. 2078, 2414.

The Government's theory is that fine particles of solid matter such as flue dust, which is discharged into the Calumet River from the sewers of respondents, causes substantially all of the shoaling in the Calumet River. One Government expert gave his opinion, based upon evidence respondents contend to be incompetent, that the effluents from these respondents' sewers accounted for 69.6% of all the shoaling in almost a four-mile stretch of the federal channel in the Calumet River (App. 1289). The same expert, as an "example" of calculations "which could be made," estimated that these respondents could account for 93% of the shoaling (App. 1293). The trial judge split the difference and found that respondents contributed not less than 81.5% "of the industrial wastes" in the federal channel of the Calumet River (Fdg. No. 43, App. 106). Respondent contended that the opinions of the Government's witnesses and the findings based thereon were not based upon nor supported by competent evidence, and ignored obvious other sources of shoaling. The Court of Appeals did not pass upon these contentions.

In addition to the sewers of respondents, there are 37 other sewer outfalls which discharge some suspended solid matter into the Calumet River (Govt. Exhibit 6, App. 365-70; App. 2036-2047).

Petitioner, in summarizing the findings of the trial court (Pet. 3), states, on the basis of finding 9 (App. 99-100), that the Army Engineers have maintained the channel since 1881. Finding 20 (App. 101) is to the effect that respondents did the 1951 dredging and paid for it. See also Government's Exhibit 42 (App. 717, 2467). Respondent International Harvester Company stated in its answer that making payment under the circumstances did not constitute an admission (App. 81), and there was no finding of fact or conclusion of law that it did.

Petitioner has referred (Pet. 4) to the statement of the

House Committee. The record will show that this statement was not made pursuant to any hearing at which respondents were present or were heard. The statement appears to be based solely upon representations made by the Army Engineers.

ARGUMENT.

Respondents contend that the judgment of the Court of Appeals is right and that the opinion is a proper exposition of the controlling law. It should be noted, however, that the Court of Appeals did not find it necessary to discuss several other factors which, petitioner contends, would have required a reversal of the judgment of the trial court. For example, respondents contended that there was no evidence upon which to base several of the findings and that others were based upon incompetent evidence. It was also contended that the decree of the trial court is meaningless in requiring the dredging of a percentage of industrial waste without in any way defining the term. It is admitted by the Government that some of the material in the channel is the result of natural erosion.

The prohibitory portion of the decree is likewise indefinite in that it enjoins respondents from depositing industrial solids into the federal channel of the Calumet River without first obtaining a permit from the Chief of the Engineers providing for "satisfactory conditions" for the removal of future deposits and discharges.

1. The decree is erroneous for the further reason that it delegates to the Chief of Engineers the determination of what is "satisfactory." Sections 403 and 407 of Title 33 of U. S. C. contemplate that any discretion should be exercised by the Secretary of the Army, not the Chief of Engineers.

There were other grounds urged for reversal which were not passed upon.

1. The Petition Discloses No Question of Importance for This Court.

The petition discloses no question of importance to be resolved by this Court. As a matter of statutory construction, the court below decided that the discharges from respondents' sewers did not constitute a violation of the Rivers and Harbors Act of 1899 and that under the terms of that statute the Government was not entitled to injunctive relief.

The Court of Appeals emphasized the difficulty of resolving the conflict between navigational interests and those of riparian owners (Pet. 11a). We submit that the court correctly concluded that Congress is in a better position to do so than a court.

The 1954 report of the House Committee (H. Rept. No. 1345; 83d Cong., 2d Sess., p. 10) and the letter of the Chief of Engineers filed on December 9, 1954 referred to in the petition do not disclose any reason for this Court to grant certiorari. They certainly cast no light upon the proper interpretation of the 1899 statute. They suggest that the questions presented by the petition should be addressed to Congress. And they show that a committee of the Congress is cognizant of the subject matter of the litigation.

In an attempt to show the possible influence of the opinion of the court below upon other litigation, petitioner cites *U. S.* v. *Anchor Oil Corporation* (S. D. Cal., Cen. Div.), as a reason why this Court should grant certiorari in the instant case. In the complaint in that case (No. 800-58 W. M. Civil) the United States seeks equitable relief and compensation for substantial damages to the Long Beach Naval Shipyard, the United States Naval Station, and other fed-

eral properties, caused by subsidence of the land allegedly brought about by the removal of gas and oil from the Wilmington Oil Field in Long Beach, California. While the complaint also alleges interference with navigation at the shipyard and the Long Beach harbor, the United States there is protecting a direct proprietary interest in its own property. The opinion of the court below is no threat to that case nor, so far as indicated by the petition, to any other pending case in which petitioner is a party. Certainly that case has no bearing on the instant one and is not a reason for issuing the writ.

2. The Decision of the Court Below Is Clearly Correct.

The Court of Appeals held (1) that the discharge of respondents' sewers into the Calumet River did not constitute a violation of the Rivers and Harbors Act of 1899, and (2) that under the terms of that statute, petitioner was not entitled to injunctive relief. The holding conforms not only to the express language of the 1899 statute but is also required by its statutory history.

Throughout the long course of rivers and harbors legislation, Congress, in the exercise of the commerce power, has appropriated funds for the maintenance of navigable waterways. The present contention of petitioner that Congress intended to shift to private industry the expense of maintaining the Calumet River is inconsistent with the history of rivers and harbors legislation. In the light of this history, such an intent should not be read into the statute unless clearly expressed.

Petitioner cites *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1 (1888). That case specifically held that in the absence of affirmative action by Congress, there is no federal common law pertaining to obstructions to navigation. This Court reaffirmed the principle of the *Willamette Iron Bridge Company* case in *Cummings* v. *Chicago*, 188 U. S.

410, 427 (1903), which held that the river involved in the instant case, the Calumet River, is entirely within the limits of Illinois and that the authority of the State of Illinois "over it is plenary, subject only to such action as Congress may take in execution of its power under the constitution to regulate commerce among the several states."

In the present case the Government in the trial court relied upon sections 403 and 407 of 33 U. S. C. A. Section 403 has to do with the creation of obstructions, etc. and section 407 has to do with the discharge or deposit of refuse matter into navigable streams. The only statutory provision with respect to an injunction is found in section 406 and this provision is limited to the removal of structures or parts of structures. There is nowhere, in any applicable statute, authority to enter a prohibitory injunction or an injunction requiring the removal of anything other than "structures or parts of structures erected in violation. * * *"

Petitioner argues (Pet. 22) that the "negative implication" that Congress intended to change existing law is contradicted by legislative history and contrary decisions. The express language of section 403 is that the creation of an obstruction is prohibited. The express language of section 406 is that the removal of structures or parts of structures erected in violation of the statutes may be prohibited by injunction. The maxim "*expressio unius exclusio alterius*" clearly applies. The statute states that an injunction may be granted to remove *structures*. Section 406 does not refer to obstructions. Moreover, respondent's flue dust is not an obstruction within the meaning of section 403.

Petitioner injects here for the first time the earlier 1890 statute and asserts that it authorized the injunction issued by the trial court. But the only relevant precedent, even under the broader language of that statute, indicates that the flocculated flue dust from the sewers of these respond-

ents was not an obstruction and that equitable relief would not be granted, *U. S.* v. *Burns*, 54 Fed. 351 (discussed in the opinion of the court below).

Moreover, as indicated below, the Act of 1899 superseded the 1890 statute and omitted the broad grant of power with respect to injunctive relief that was contained in the Act of 1890; and it is elementary that where there is a statute enacted which covers a situation formerly covered by another statute, omissions in the new statute are considered to be by design. In fact, as stated in *Wheeler* v. *Green*, 280 U. S. 49, 51, and quoted by the Court of Appeals, "it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed." It is submitted that had Congress intended to grant injunctive power with respect to anything but structures, it would have expressly done so, and that the omission in the 1899 statute of that which was included in the 1890 statute is presumed to be and was made with full cognizance of its legal effect.

It is clear that the shoals allegedly created by respondents' sewers are not *structures* within the meaning of the statute. The trial court found that the industrial solids in the effluents from respondents' sewers consisted of many fine particles. "Those fine particles tend to flocculate into larger units, that is, they are attracted and held together by electrical forces, and tend to deposit loosely on the river bottom in a form that could be represented on a larger scale by a pile of matchsticks dropped at random" (Fdg. 30, App. 103, 104).

One Government expert testified that most of the particles were smaller than 44 microns and therefore could not be analyzed microscopically (App. 931). (A micron is a unit of length equal to 1/1000th of a millimeter. There are about 25,000 microns in 1".) (App. 940.) Another

Government expert testified that "the worst offenders" in causing the alleged shoaling were particles so tiny that they could not even be seen with the aid of an ordinary microscope (App. 1300). Another expert testified that the flocculated flue dust from respondents' sewers has "thixotropic" tendencies—"a characteristic whereby materials in suspension may act as a solid when undisturbed but, when disturbed mechanically or otherwise, might act as a fluid" (App. 1191). It is submitted that the flocculating flue dust from respondents' sewers is not a *structure* within the meaning of the statute and is therefore not a proper subject for injunctive relief.

Section 407 of title 33 (section 13 of the 1899 Act) (Pet. p. 34a) is the provision of the Rivers and Harbors Act of 1899 which specifically applies to material discharged by the sewers of the three defendants. It contains no authorization for an injunction.

Section 407 forbids the discharging or depositing of refuse matters into navigable waters; but it expressly excepts refuse matter "flowing from streets and sewers and passing therefrom in a liquid state." It is submitted that the court below correctly held that the matter discharged by the respondents was in a liquid state.

As indicated above, the findings of fact of the trial court emphasized that the effluents from respondents' sewers included tiny flocculating particles of solid matter. The Government's own experts emphasized that the worst offenders were smaller than a wave length of light (App. 931, 2191). Even city tap water contains some solid matter in suspension which will settle out if water is left in a drinking glass overnight. If the exception in section 407 were to be construed as meaning only material in a chemical solution, the exception would be deprived of any meaning.

When the section was first enacted in 1894, the knowl-

edge and techniques concerning waste disposal were such that Congress must have intended to include in the statutory exception water which carries such fine particles.

The petition (p. 15) suggests that when Congress used the word "sewers," it did not mean all sewers but just some sewers. There is nothing in the statute to indicate such a distinction. Nothing in the common understanding of the word "sewer" suggests that Congress did not intend to include Harvester's sewers in the statutory exception. In fact, Webster's New International Dictionary (2nd Ed., 1951) includes among the definitions of the word sewer, "An artificial, usually subterranean, conduit to carry off water and certain waste matter, as: * * * (3) waste water from industrial works."

At the time the section was first adopted in 1894, steel and iron mills had been in existence in the area of the Calumet River and elsewhere for many years, and the nature of their operations was generally understood. Then, as now, they used vast quantities of water, which they removed from the river and subsequently returned thereto. The only relevant difference between their operations now and then is that with the advance in technology, a much higher percentage of industrial solids is removed from the water before it flows back into the river. Respondent's outfalls are sewers today, were sewers in 1894, and are sewers within the meaning of the statute.

Section 407 specifically excepts "refuse matter of any kind or description" "flowing from streets and sewers and passing therefrom in a liquid state" and thus authorizes the discharges from Harvester's sewers. Under accepted rules of statutory construction, Harvester's sewers could not constitute a violation of any other portion of the statute. Thus this court recently stated in *Fourco Glass Co. v. Transmirra Corp.*, 353 U. S. 222, 228-9 (1957):

"* * * In these circumstances the law is settled that

'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.' *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107."

3. There Is No Conflict in Principle With the Opinions of This Court.

The petition asserts that the opinion of the court below is in conflict with *Sanitary District* v. *U. S.*, 266 U. S. 405 (1924), but that case involved a wholly different principle. It involved a conflict between State and federal power and this Court held that the United States, in the exercise of its sovereign power, had standing to sue to carry out its treaty obligations to a foreign power, to protect its paramount and sovereign interest in the Great Lakes, and to prevent the State of Illinois from interfering with the constitutional power of the United States. The late Mr. Justice Holmes there pointed out that "in matters where the States may act the action of Congress overrides what they have done * * * but in matters where the national importance is eminent and direct even where Congress has been silent the States may not act at all," 266 U. S., at p. 426. This Court thus intimated that in view of the issues involved in that case the State of Illinois was powerless to act even if Congress had failed to do so.

But as indicated above this Court had earlier conclusively decided in *Cummings* v. *Chicago*, 188 U. S. 410, 427 (1902), that the Calumet River is located entirely within the confines of Illinois and that the authority of the State over it is plenary, subject only to such action as Congress may take in execution of its powers under the Constitution to regulate commerce among the several States. This Court

has thus held that unlike the situation presented in the *Sanitary District* case the State of Illinois has the plenary power over the Calumet River except where Congress has acted. Accordingly the decision of the court below that the Rivers and Harbors Act of 1899 did not authorize the prohibitory and mandatory injunctions was not inconsistent with the *Sanitary District* case.

Moreover, the *Sanitary District* case did not in any way involve the construction or application of section 13 of the 1899 statute (33 U. S. C. 407), which specifically forbids the depositing of "any refuse matter of any kind or description whatever" except "that flowing from streets and sewers and passing therefrom in a liquid state."

Petitioner contends that the Attorney General has authority to seek an injunction against illegal interference with commerce, citing *In re Debs*, 158 U. S. 564. That case sustained the power of the Attorney General in the absence of a statute to obtain an injunction in a strike which was crippling interstate commerce and which created a national emergency. In the present case the record shows no interference with shipping since the 1951 dredging and there is no emergency. The petition states that even private parties may enjoin illegal deposits in navigable streams. Private parties may, in a proper case and if they have the necessary interest, enjoin interference with navigation, just as they may enjoin an obstruction in a highway. The question here is whether the Federal Government can secure an injunction without an act of Congress with respect to deposits in an intrastate stream.

Petitioner argues that general equitable principles support the award of the injunctions and cites *Archer v. Greenville Gravel Co.*, 233 U. S. 60, and 1 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 253, pp. 501-505. This last contention is beside the point. The question here is not whether or not an injunction could be granted to a proper

party having an interest to be protected but rather whether the statute under which the complaint was filed, the case tried, the findings of fact and conclusions of law made, and the decree entered authorizes the injunctions.

4. There Is No Significant Conflict Among the Circuits Warranting Certiorari.

In this case, the Government has asserted for the first time a right to compel industry to maintain a navigable waterway by invoking the equitable powers of a federal court. Thus the case is not in conflict with any decision of any other circuit. The petition asserts that the opinion below and the holding of the Second Circuit in *U. S. v. Wilson*, 235 F. 2d 251 (1956), are in conflict with the old opinion of the Ninth Circuit in *U. S. v. Wishkah Boom Co.*, 136 F. 42, in holding that the 1899 Act repealed the 1890 Act. We submit that the conflict is not of such a nature as to warrant certiorari. As pointed out by the Second Circuit, the opinion in the *Wishkah Boom* case that the 1890 statute had not been repealed was not necessary to a decision of that case.

Moreover, the Second Circuit and the court below were right in holding that the later Act repealed the earlier. Section 20 of the 1899 Act, 30 Stat. 1155, specifically provided that "all laws or parts of laws inconsistent with the foregoing sections 10 to 20, inclusive, of this Act are hereby repealed." If the 1890 Act is placed alongside of the 1899 Act, it cannot be denied that the two are inconsistent with each other and that the 1899 statute specifically limited the use of the injunction to the removal of structures. In correctly holding that the Government's right to an injunction was limited by the 1899 statute, the Second Circuit said (235 F. 2d, p. 253):

> "* * * With deference, we think that the court overlooked the fact that the repeal clause covered prior

laws which were inconsistent not merely with § 10 of the later Act but, rather inconsistent with §§ 10 to 20, inclusive of the later Act. As we have noted, if §§ 10, 12, 15 and 19 of the later Act be read together as they should be, they are inconsistent with § 10 of the earlier Act. By way of editorial comment to 33 U. S. C. A. § 403 it was stated that § 10 of the earlier Act 'was probably omitted from the Code [as indeed it was] as superseded by' § 10 of the 1899 Act. We hold that it was indeed repealed by § 20 of the 1899 Act."

In holding that a sunken barge was not a "structure" within the meaning of the statute and therefore not the proper object of a mandatory injunction, the Second Circuit further held (235 F. 2d, p. 253):

"* * * The injunctive power so provided is expressly limited to 'the removal of any structures or parts of structures erected in violation of the provisions of' §§ 9, 10 and 11 of the 1899 Act. 33 U. S. C. A. §§ 401, 403 and 404. Clearly, our sunken barge is not a structure prohibited by §§ 9 and 11 which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in § 10, 33 U. S. C. A. § 403. *In re Eastern Transportation Co.*, D. C., 102 F. Supp. 913. That section prohibits, first, 'The creation of any [unauthorized] obstruction * * * to the navigable capacity' of United States waters, and, second, the building of 'any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other *structures*' in any port, etc. (Emphasis supplied.) It thus makes a plain distinction between 'obstructions' and 'structures.' Section 12, 33 U. S. C. A. § 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by § 10, 33 U. S. C. A. § 403. * * *"

As pointed out by the Second Circuit, the language of the 1899 statute has been omitted from the United States Code. Section 204 of Title 1 of the United States Code expressly provides that the Code is *prima facie* evidence of

the law. It follows that the omission of earlier statutes from the Code is *prima facie* evidence of their repeal.

5. This Court Should Not Grant Certiorari to Consider Issues Not Presented by the Record and Not Argued Below.

The petition for certiorari attempts to present to this court two issues not even argued below:

(a) As indicated above, it was not even intimated in the United States Court of Appeals that the Government was relying on the earlier, and we contend repealed, provisions of the Act of 1890. The pleadings, memorandum opinion, findings of fact and conclusions of law in the trial court clearly demonstrate that both the Government and the trial judge were invoking the 1899 statute as the basis for injunctive relief.

(b) The concluding paragraph of the petition cites FRCP 54(c) and asserts that the United States Court of Appeals should have sent the case back to the District Court to award the cost of dredging. This is the first intimation that the Government seeks damages. The pleadings contain no prayer for damages, the Government offered no evidence about the propriety of awarding damages nor the amount thereof, it tendered no findings of fact nor conclusions of law concerning damages, and the record of the case is completely silent on the question of damages. The Government did not argue in the United States Court of Appeals that it was entitled to damages, and the only reference to damages in that court was the assertion by respondent that if the Government was entitled to any remedy at all it was an action for damages and that the Government's remedy at law was adequate.

It is respectfully submitted that this Court should not grant certiorari to reverse the court below on grounds not even argued before that court.

CONCLUSION.

It is respectfully submitted that the petition for certiorari and the record of this case fail to disclose any question of such importance as to warrant a review by this Court, and that, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]56

UNITED STATES OF AMERICA,

Petitioner,

vs.

REPUBLIC STEEL CORPORATION; INTERNATIONAL HARVESTER COMPANY, and INTERLAKE IRON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT INTERLAKE IRON CORPORATION IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 859.

UNITED STATES OF AMERICA,

Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, and INTERLAKE IRON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT INTERLAKE IRON CORPORATION IN OPPOSITION.

OPINIONS BELOW.

The memorandum of the District Court is reported at 155 F. Supp. 442. The opinion of the Court of Appeals (Appendix A of Petition)* is reported in 264 F. 2d 289.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

* The following abbreviations are used in this brief: Certified Copy of Joint Appendix to Defendants-Appellants' briefs below—Jt. App. . Appendix A of Petition—App. A of Pet. . Appendix B of Petition—App. B of Pet. . The Rivers & Harbors Act of March 3, 1899—R. & H. Act of 1899 or the 1899 Act. The Rivers & Harbors Act of September 19, 1890—R. & H. Act of 1890 or the 1890 Act. Petition—Pet. . All emphasis is supplied.

QUESTIONS PRESENTED.

1. Whether the validity of the challenged acts of Interlake Iron Corporation (hereinafter called "Interlake") is exclusively governed by Section 13 of the Rivers & Harbors Act of 1899 (33 U. S. C. 407) by which the Congress comprehensively and specifically regulated the discharge of "any refuse matter of any kind or description whatever * * * into any navigable water of the United States"?

2. Whether, by discharging into the Calumet River sewer effluents (of which from 99.98% to 99.99% is water) Interlake violated Section 13 of the R. & H. Act of 1899 (33 U. S. C. 407) in which Congress specifically excepted from its prohibitions the discharge of "any refuse matter of any kind or description whatever * * * flowing from streets and sewers and passing therefrom in a liquid state"?

3. Whether, assuming *arguendo*, Section 10 of the R. & H. Act of 1899 (33 U. S. C. 403) were applicable, the foregoing acts of Interlake would violate that statute?

4. Whether the statutory remedies specifically and expressly created and provided by the Congress in Section 12 of the R. & H. Act of 1899 (33 U. S. C. 406) for a violation of Section 10 of the R. & H. Act of 1899 (33 U. S. C. 403) and in Section 16 of the R. & H. Act of 1899 (33 U. S. C. 411) for a violation of Section 13 of that Act (33 U. S. C. 407) are exclusive and would bar the relief sought by Petitioner had a violation of either Section been established?*

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* Numerous other issues, which the court below found it unnecessary to decide (App. A to Pet. 31a), are not presented by the pending Petition.

STATUTES INVOLVED.

Sections 10, 12 and 13, part of Section 16, and the repealing clause of Section 20 of the R. & H. Act of March 3, 1899, 30 Stat. 1121, 1151-2, 1153, 1154, 33 U. S. C. 403, 406, 407, 411. Sections 10, 12 and 13 of the 1899 Act are printed in Appendix B to the Petition at 33a-35a. The relevant part of Section 16 and the repealing clause of Section 20 of the 1899 Act are printed in Appendix A hereto at page 1a. Neither Section 10 of the R. & H. Act of September 19, 1890 (26 Stat. 426, 454), any other section of the 1890 Act, Section 17 of the 1899 Act nor F. R. C. P. 54(c) is involved.

STATEMENT.

In this action separate claims were permissively joined against the three Respondents (F. R. C. P. 20(a).* The original and amended complaints alleged that each Respondent had violated and was violating sections 403 and 407 of Title 33 of the United States Code by discharging and depositing "industrial solids and flue dust" in a section of the channel of the Calumet River. The Calumet River lies wholly within the State of Illinois.

Petitioner sought a decree (1) restraining each Respondent from depositing or discharging "industrial solids

---

* The permissive joinder of *separate* claims against the three Respondents obviously did not authorize the District Court (1) to make general or blunderbuss findings against all Respondents whenever there was any evidence to support a finding against any one of them or (2) to refuse to make any findings on facts relevant to the separate claim against Interlake which were supported by uncontradicted evidence. Nevertheless, the trial court, adopting verbatim or substantially verbatim proposed findings of Petitioner, made numerous undiscriminating general findings wholly unsupported as to the claim against Interlake and refused to make any findings on undisputed facts relevant to the separate claim against Interlake. (Cf. Jt. App. 190-251 with Jt. App. 98-110.)

or flue dust" into the channel of the Calumet River without a permit and (2) commanding Respondents, and each of them, to restore the authorized project depths and widths throughout a section of the River *extending 1800 feet upstream and 13,200 feet downstream* from the mouth of any sewer of Interlake. (Comp., Jt. App. 7-9; Amend. Comp., Jt. App. 71-4.) In addition to the steel plants of the other Respondents, two plants for the production of coke, pig iron, steel and various steel products, each of which is very much larger than the plant of any Respondent, are located *upstream* from the plant of each Respondent. In addition to the plants of the three Respondents, numerous other industrial plants are located on, and 37 sewers in addition to the Respondents' sewers discharge into, the Calumet River both above and below the Interlake plant.

The District Court entered a decree granting the relief prayed by Petitioner. (Jt. App. 111.) The Court of Appeals reversed with directions to dismiss the amended complaint upon the independent grounds (1) that the acts of Interlake and the other Respondents did not violate either Section 403 or Section 407 of 33 U. S. C. and (2) that, had Petitioner established a violation of either Section, the respective remedies created and provided by the Congress for a violation of each of those sections are exclusive and do not authorize the relief sought by Petitioner. (App. A to Pet. 22a, 1a-31a inc.) Consequently that Court found it unnecessary to state or decide the numerous other grounds upon which Respondents attacked the validity of the decree of the trial court. (App. A, Pet. 31a.)

Petitioner's statement ignores the separate character of the claim against each Respondent, the differences among the character and operations of their respective

plants, the extremely fine nature of any materials carried in suspension by sewer effluents, and the numerous processes and equipment by which each Respondent reclaims such materials to the greatest practical extent. (App. A to Pet. 18a, 19a.) Since the claim against Interlake is wholly separate and independent, Interlake's statement is limited to matters relevant to that claim.

Interlake produces merchant pig iron at a plant located on the Calumet River more than 2 miles downstream from Lake Michigan. It does not own or operate any steel making furnaces, steel mills, or fabricating mills. Interlake withdraws water (carrying some solids in suspension) from the Calumet River for industrial use in the operation of coke ovens and blast furnaces for the production of pig iron. Unavoidably the operation of coke ovens and blast furnaces respectively creates "coke breeze" and "flue dust." * These are the principal and only significant "industrial solids" involved in the claim against Interlake.

Each of these products is valuable; and self-interest alone compels Interlake to avoid any loss of either product to the greatest practical extent. In the production process some of each material comes into contact with, and is taken up by, some of the water drawn from the River. Numerous processes and types of equipment are used by Interlake to recover these materials from the water before it flows

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* "Coke breeze" and "flue dust" principally consist of very fine particles. Petitioner's witnesses conceded that most of these particles were smaller than 44 microns and that many are so small that they could not be seen even with the aid of an ordinary microscope. (Jt. App. 931, 1300.) Much of the small amount of material carried in suspension or solution by the outflow of Interlake's sewers is so fine that it will never settle out. (Jt. App. 1047-8.) A micron is .001 of a millimeter or .00003937 of an inch. The facts with respect to the fineness of this material are set forth in the opinion below. (App. A to Pet. 18a.)

back through five sewers into the River or into the privately-owned Semet-Solvay slip. Small amounts of very fine particles of these valuable materials, which are carried in suspension or solution, cannot be recovered from the water. However, from 99.98% to 99.99% of the effluents of each of Interlake's sewer is *water*. (Jt. App. 2456.) With passage of time and changing conditions some of the fine material carried in the returning water settles out of suspension or solution and deposits at fortuitous times and places outside or inside of the navigation channel and in a private slip which connects with the River.

Interlake, which has consistently dredged in front of its plant and in its private slip, dredged 254,535 cubic yards of material from those locations between 1946 and 1955 (Jt. App. 2466). In 1951 the three Respondents voluntarily cooperated in dredging the section of the River in *front* of their respective plants (but not for 700 feet *upstream* and approximately 2 miles *downstream* from the plant of any Respondent as ordered by the District Court) upon an express understanding with the Corps of Engineers that their voluntary and gratuitous action should not constitute, or ever be claimed to constitute, the assumption or recognition of any obligation to do such dredging by any of the Respondents. Upon this frail and incompetent basis Petitioner seemingly asserts an established practice or "administrative construction" of the relevant statute. (Pet. 4, 14-5.) Manifestly, the *1954* report (H. Doc. 1345, 83rd Cong. 2d Sess.) to which Petitioner refers (Pet. 4-5, 6-7, 15), is not competent proof of any alleged fact and is wholly irrelevant to the legislative history or construction of the Rivers and Harbors Act of March 3, *1899*. *E. g. United States v. Rumely*, 345 U. S. 41, 48; *United States v. Mineworkers*, 330 U. S. 258, 281-2.

ARGUMENT.

The claim against Respondent Interlake presents a very narrow issue which plainly does not warrant review by this Court on certiorari. On the facts relevant to the claim against Interlake, the decision of the Court of Appeals was manifestly correct. There is no conflict of decision. In the light of the language and legislative history of the Act, no other result could have been reached. Manifestly there is no important question of federal law requiring decision by this Court. What the Petitioner really seeks is to persuade this Court to usurp the functions of the Congress by legislating for the purpose of supplying what Petitioner claims to be omissions in the comprehensive legislation enacted by Congress in 1899.

I. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

A. The Validity of Interlake's Acts Is Exclusively Governed By 33 U. S. C. 407.

1. Sections 403 and 407 were simultaneously enacted as Sections 10 and 13 of the 1899 Act. Contrary to Petitioner's assertions (Pet. 9, 16) the 1899 Act was not a mere "codification" of existing laws for the protection of federal navigable waters. The 1899 Act had its genesis in section 2 of the R. & H. Act of June 3, 1896, which provided:

> "Sec. 2. That the Secretary of War is directed to cause to be prepared a compilation of *all general laws* that had been enacted *from time to time* by Congress for the maintenance, protection, and preservation of the navigable waters of the United States, and to submit the same to Congress with such recommendation as to *revision, amendation, or enlargement* of the said laws as in his judgment would *be most advantageous to the public interest.*" (29 Stat. 202, 234.)

On February 13, 1897 the Secretary transmitted to the Congress his Report in which he stated:

> "In pursuance of the foregoing provision of the act, I have the honor to submit herewith (1) a compilation of the general laws relating to the maintenance, preservation, and protection of navigable waters of the United States now in force, and (2) a draft of an act embodying such *revision and enlargement* of the aforesaid laws as the experience of this office has shown to be *advantageous to the public interest*." (H. D. 293, 54th Cong., 2d Sess., p. 2.)

The Secretary's draft of a proposed Act was entitled "Act *Revising and Enlarging* Laws for Protection of Navigable Waters." (Id. 8.) The Secretary's Report was before the Congress for more than two years prior to the enactment of his proposed Act in the R. & H. Act of March 3, 1899.

The 1899 Act was a comprehensive revision of existing law for the protection of navigable waters (App. A. to Pet. 7a) in which Congress undertook to balance the respective national interests in protecting navigable waters and in important (often indispensable) non-navigation uses of such waters. *Infra*, 11-12. Congress undertook to accomplish this objective by dealing separately, completely, specifically and differently with different categories of the over-all subject matter in separate sections of the 1899 Act both with respect to substantive regulation and to remedy for violation. This clearly precludes an extension of any substantive or remedial provision of one section to the subject matter of another section *Iselin v. United States*, 270 U. S. 245, 250-1.

2. Where the same statute contains a section dealing specifically with particular subject matter and another section containing general language which in its most comprehensive sense would or might include the same subject matter, the special section is the controlling and

exclusive regulation of the particular subject matter and the general language of the other section is inapplicable. *United States v. Chase*, 135 U. S. 255, 260 (1890); *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932); *Fourco Glass Co. v. Transmirra Corp.*, 353 U. S. 222, 228-9

The claim against Interlake involves solely the discharge of sewer effluents, whose constitutents are not less than 99.98% *water* but contain small amounts of fine material in suspension or solution, *some* of which subsequently settles or deposits at fortuitous times and places within or without the navigation channel of the Calumet River or in a privately-owned connecting slip. Section 407 deals specifically and comprehensively with the discharge or deposit of "refuse matter of any kind or description whatever * * * into any navigable water of the United States." Section 403 does not deal specifically, and in our opinion does not deal at all, with such discharges or deposits of refuse matter. Consequently, even if any of the general language of Section 403 could otherwise be construed so broadly as to bring within its generality the subject matter of the claim against Interlake, the specific regulation of Section 407 would nevertheless be the controlling and exclusive regulation of the subject matter involved.

3. For purposes of regulation Congress in the 1899 Act carefully classified the over-all subject matter into separate categories and situations and regulated each category and situation in a separate section of the Act in which Congress specifically provided *the way in, and the extent to, which* it desired to regulate that category in balancing the respective national interests in navigation and non-navigation uses of navigable waters. Consequently, the foregoing principle applies with special and controlling force to a construction of the 1899 Act. *Iselin v. United States*, 270 U. S. 245, 251-2. Had Congress intended to

include in Section 403 the subject matter which it specifically regulated in Section 407, there would have been neither occasion nor justification for the latter section. While the *1954* House Report (Pet. 4-5) is manifestly irrelevant to a construction of the *1899* Act, it may be noted that the report refers to Section 13 of the R. & H. Act of 1899 (33 U. S. C. 407), as the only statute allegedly violated.

B. Interlake's Acts Do Not Violate Section 407.

1. Section 407 declares unlawful the discharge or deposit "* * * from the shore, wharf, *manufacturing establishment, or mill of any kind,* any refuse matter of any kind or description whatever *other than that flowing from the streets and sewers and passing therefrom in a liquid state*, into any navigable water of the United States, * * *." (App. B to Pet. 33a.) Plainly, the phrase, "other than that flowing from streets and sewers and passing therefrom in a liquid state," is an exception which excludes everything within its scope from the operation of the statute.

2. With respect to the claim against Interlake, the sole issue is whether Interlake's sewer effluents (whose constituents are not less than *99.98% water* but contain a small unreclaimable amount of fine material in suspension or solution) fall within the foregoing exception. The District Court, by an unreasoned adoption of a proposed finding and conclusion of Petitioner, held that the exception does not apply to sewer outflows which contain *any refuse matter whatsoever in suspension* or other than in *permanent solution.* (Jt. App. 104, 108, Fdg. 33, Concl. 3.) Thus, the trial court deprived the exception of all force and effect and treated the congressional language as mere surplusage.

3. In creating this exception the Congress plainly intended to exclude from the prohibition of Section 407 *street runoffs and sewer outflows* which carry *some* "refuse matter." It did not intend to create an illusory exception which could have no application to the subject matter being regulated under the well known facts of community, business and industrial life.

Petitioner concedes that not only during and prior to 1899, but "throughout our national history navigable waters have been used not only for navigation but also for manufacturing, for domestic purposes and for the disposal of domestic and industrial trade wastes." (App. A. to Pet. 21a.) Such non-navigational uses have been and are of incalculable value to, and indispensable to the maintenance and functioning of, the national economy. It is not and cannot be denied that the Congress, in creating the exception to Section 407, was exercising its constitutional authority under the Commerce Clause to balance the respective national interests in the navigation and non-navigation uses of navigable waters. E. g., cf. *Gilman v. Philadelphia*, 3 Wall. 713, 729; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 430, 432; *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, 209-10.

Both Sections 407 and 403 were enacted in 1899. In 1900, out of a total national urban population of 30,400,000, the aggregate urban population, which provided *even partial* treatment for their domestic and trade wastes, was only 1,000,000 or less than 3½%. The domestic and trade wastes of the remaining urban communities were discharged without any treatment into the nearest body of water and carried large quantities of solids in suspension or impermanent solution. Throughout this period, a statute which prohibited a discharge of street run offs or of domestic and trade wastes flowing from sewers, which carried any solids in suspension or impermanent solution,

would have outlawed the method universally used for the disposal of such wastes and would have brought urban life and industrial activities to a standstill throughout the nation. (App. A to Pet. 18a-19a.) Even today the result of Petitioner's construction would be little less disastrous. To attribute any such intent to the Congress is indefensible and certainly could be justified only by congressional use of the most clear and compelling statutory language.

4. The words of a statute are given their customary meaning in common and everyday usage at the time when the statute was enacted. *Great Northern Railway Co. v. United States*, 315 U. S. 262, 273; *United States v. Stewart*, 311 U. S. 60; *United States v. Missouri Pacific R. Co.*, 278 U. S. 269, 278-9. To suggest that an effluent, which is not less than 99.98% water, is not in a liquid state because it carries a small amount of non-reclaimable fine material in suspension (much of which cannot be seen with an ordinary microscope) flies in the face of the common ordinary meaning which people put upon language of this kind. (App. A to Pet. 18a, 19a.)

5. Another applicable principle is that the courts will not attribute to Congress an intent to do a vain and futile thing or construe statutory language so as to render it mere surplusage. Even the water in lakes and streams virtually untouched by civilization contain some material in suspension; and even the most modern complete treatment of domestic and trade wastes does not remove a substantial part of the suspended solids. (App. A to Pet. 21a-22a.)* Had Congress intended to prohibit the discharge of all run-offs and sewer effluents except those which contain no "refuse matter" whatsoever except in

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* Section 13 of the 1899 Act (33 U. S. C. 407) superseded Section 6 of the Act of August 18, 1894 (28 Stat. 338, 363) which had superseded Section 6 of the 1890 Act (26 Stat. 426, 453). The words quoted by Petitioner are from the 1890 Act. (Pet. 16.)

permanent solution, there would have been no reason or justification for creating this exception.

6. Although Section 407 and its predecessors have been in force for nearly 70 years, no decision can be found in which it has been held that Section 407 prohibits the discharge of street runoffs and of domestic or trade wastes carried in suspension by liquids flowing from sewers into navigable streams.

7. Petitioner's specious argument that, unless the exception incorporated in Section 407 is limited by "Procrustean "construction" to run-offs and outflows which contain no refuse matter whatever which is not in permanent solution, then it will be lawful to discharge in navigable waters anything which can be transported by water through a pipe line or the refuse from hydraulic dredging and to construct a dyke in such waters so long as it is built by a hydraulic process, is self-refuting. (Pet. 15-7, 21.) Moreover, Petitioner conveniently disregards the fact that the construction of a dyke is specifically regulated by Sections 9 and 12 of the 1899 Act (33 U. S. C. 401, 406).*

C. Assuming Arguendo That Section 403 Were Applicable to Interlake's Acts, Its Acts Do Not Violate That Section.

1. With respect to the alleged applicability of Sec. 403 to the claim against Interlake, the material facts are: Not less than 99.98% of the effluent of each sewer of

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* *Sanitary District v. Chicago Packing Co.*, 241 Ill. App. 288 (Pet. 16) involved a construction of state statutes enacted to protect the public health. The court's criterion was not whether particular types of putrescible wastes were solid or liquid but whether dilution and oxidation in flowing water would render them harmless to the public health. In substance the Court held that even "garbage, bones, parts of dead animals," and the like could be dumped in the drainage canal if "they be diluted and oxidized by water." (l. c. 298-9.) The case is completely inapposite both on the facts and law.

Interlake is water. These effluents carry small amounts of valuable but non-recoverable fine materials in suspension or solution, some of which settle out and deposit at fortuitous times and places within or outside of the navigation channel or in a connecting privately-owned slip.

2. The first clause of Section 403 prohibits the "creation" of any obstruction not affirmatively authorized by Congress. When this language is read in its normal meaning and in connection with the language of the second and third clauses of Section 403 and of other sections of the 1899 Act, it is, we believe, clear that the first clause does not apply to Interlake's acts. Instead, the first clause applies to the planned creation of obstructions of a permanent character according to the usual modes by which the type of obstruction involved is customarily built for some specific purpose.. *United States v. Wilson* (C. A. 2, 1956), 235 F. 2d 251, 252-3; *United States v. Drainage District No. 3* (D. C. Tex.), 2 F. 2d 861, 862;* *United States v. Burns* (C. C. W. Va. 1893), 54 Fed. 351, 363;* *In Re Eastern Transport Co.* (D. Md. 1952), 102 F. Supp. 913. Cf. *Loud v. United States* (C. C. A. 6, 1923), 286 Fed. 56, 59.

Petitioner misconceives or misstates the ground of decision in *United States v. Wilson*, 235 F. 2d 251. (Pet. 11-2.) That decision held that, although the sunken barge was an obstruction to navigation, it was not an obstruction covered by Section 403 for precisely the same reason that Section 403 does not apply to Interlake's acts.

3. Even if the fortuitous deposit of fine materials from the effluents of Interlake's sewers could be regarded as an

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* Neither of these cases can be brushed aside by bald assertions. (Pet. 12, fn. 5.) Upon this point the language of Section 10 of the 1890 Act, which was construed in the *Burns* case, did not differ from that of the first clause of Section 403; and the *Burns* decision must have been known to Congress when it enacted the 1899 Act.

obstruction within the meaning of Section 403, such an obstruction would be affirmatively authorized by Congress by the exception incorporated in Section 407. (See Par. 4 below.)

4. As Petitioner conceded in the court below, "Annual or periodic maintenance dredging is a necessary part of the cost of maintaining navigation improvements." (Pet. Br. below, 113.) This fact was well known to the Congress.* Plainly Congress, in creating the exception to Section 407, determined that it was in the national interest for the Government to bear the increase, if any, in the cost of maintenance dredging which might result from that exception. Such a congressional determination is conclusive. Consequently, even if suspended material settling from street runoffs or sewer outflows should create an obstruction *in fact*, it would not be an obstruction *in law*. *Pennsylvania v. Wheeling Bridge Co.* (59 U. S. (18 How.), 421, 430, 432; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 64; *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, 209-10; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 268.

5. Petitioner did not contend in the court of appeals, and does not contend in this Court, that the second clause of Section 403 has any application. (App. A to Pet. 15a.)

6. The third clause of Section 403 makes it unlawful "to excavate or fill" or "to alter * * * the capacity" within

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* Official reports make clear that at and prior to the time when the 1899 Act was passed, the cost of maintenance dredging was borne by the Government both generally and specifically in the Calumet River. (App. B hereto, 2a-4a.) (See also H. Doc. 494, 72d Cong., 2d Sess., 3-4, ¶ 7; 20, ¶ 3; 24-5, ¶ 9; 35, ¶ 27.) Petitioner's curious argument that Congress could not have concluded that it was in the national interest for the Government to bear the increased cost, if any, which might result from the exception incorporated in Section 407, disregards the long established and continuing policy of Congress to provide costly inland waterways (including locks), inland harbors and coastal harbors for use by direct "beneficiaries" without payment of tolls or charges.

the limits "of the channel" of any federal navigable water "unless *the work*" has been recommended and authorized by the specified federal officers. Thus, each of the terms to "excavate or fill" and "to alter * * * the capacity" is defined as "the work" which must be recommended and authorized by the specified officers. These words must be given their normal and commonly accepted meaning in every day usage. *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 560; *Addison v. Holly Hill Co.*, 322 U. S. 607, 617-8. Plainly, the settlement of some of the fine materials carried in suspension or solution by sewer effluents (of which not less than 99.98% is water) at fortuitous times and locations in the River does not come within the term "the work" in any normal usage and understanding of that term. (App. A to Pet. 15a-16a, 22a.) Plainly, nothing in the statute could justify giving that term the artificial meaning (unknown not only in 1899 but also today) urged by Petitioner (Pet. 14).

7. To support its argument that the acts of Respondents (including Interlake) violate Section 403, Petitioner seemingly relies principally upon *Sanitary District v. United States*, 266 U. S. 405. (Pet. 9-10.) The question involved in that case was whether State authorization was alone sufficient to validate construction of elaborate works for reversing the natural flow of the Chicago River and creating a new artificial outlet for Lake Michigan as part of a scheme for disposing of the domestic and industrial wastes of Chicago by dilution. (l. c. 424.) These elaborate works involved excavation of the entire channel of the Chicago River (then the principal harbor for Chicago) and the construction of many ancillary structures. Plainly, the elaborate works of the Sanitary District involved an excavation in navigable waters and constituted a "work" under the express language of Section 403. Otherwise, the Secretary of War would have had no

authority to issue the permit for the enforcement of which the action was brought and the validity of which this Court upheld.

In *Wisconsin v. Illinois*, 278 U. S. 367, which involved the same elaborate sanitary works for the disposal of Chicago sewage, this Court, after referring to *Sanitary District v. United States*, 266 U. S. 405, said:

> "The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and validly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so." (l. c. 414.)

D. Had Petitioner Established a Violation of Section 403 or Section 407, The Statutory Remedies Created and Provided by Congress For a Violation of Each Section Are Exclusive and Do Not Authorize the Relief Sought by Petitioner.

1. The Calumet River lies wholly within the State of Illinois. There is no federal common law applicable to obstructions and nuisances in streams which, although navigable interstate, are located wholly within a State; and, with respect to such streams, no federal cause of action for injunction or for removal of an alleged obstruction can exist separate and apart from a violation of a directly applicable federal statute. *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 8, 9 (1888); *United States v. Bellingham Bay Boom Co.*, 72 Fed. 585 (1896), aff. 176 U. S. 211, 217-8 (1900); *North Shore Boom Co. v. Niconem*, 212 U. S. 406, 412 (1909); *United States v. Drainage District No. 3*, (D. C. Tex.) 2 F. 2d 861, 862 (1925). Federal constitutional

power to regulate, protect and preserve federal navigable waters is derived from the commerce clause and is vested exclusively in the Congress. The extent to, and the means by, which petitioner can maintain an action to enjoin or remove an alleged obstruction to navigation depends upon and is limited by the extent to, and the manner in, which the Congress has exercised its constitutional authority.

Where the Congress creates such a cause of action and prescribes the remedy or remedies, the remedy or remedies so created and provided are exclusive. Thus, any right of Petitioner or its officers to enjoin or compel the removal of an alleged nuisance in such waters depends not only upon a proved violation of a directly applicable federal statute but also upon whether the form of relief sought falls within the remedies created by the Congress.

2. The remedies created and provided by Congress for a violation of Section 403 are set forth in 33 U. S. C. 406 (Section 12, Act of 1899). The only civil remedy provided by Section 406 for violation of Section 403 is an action to compel, by mandatory injunction, the removal of any *structures or parts of structures* erected in violation of that Section. Manifestly, any incidental settlement of fine material at fortuitous times and places within and without the navigation channel from Interlake's sewer effluents (which are not less than 99.98% water) are not "structures or parts of structures." *United States v. Wilson,* (C. A. 2, 1956) 235 F. 2d 251, 252-3. Petitioner's argument (Pet. 21) that the words "structures or parts of structures" in Section 406 (Section 12, 1899 Act) should be given an wholly artificial and unknown meaning to supply a remedy which Congress deliberately excluded, has already been shown to be without substance. (*Supra,* 15-16.)

The remedy created and provided by Congress for violation of Section 407 is set forth in 33 U. S. C. 411

(Section 16, 1899 Act). (App. A hereto, 1a.) Section 411 does not authorize any civil remedy whatsoever for a violation of Section 407.

Manifestly, had Petitioner established a violation of either Section 403 or Section 407, the statutory remedies created and provided by Congress for a violation of each section do not authorize the relief sought by Petitioner and granted by the District Court. Nor do such statutory remedies include recovery of the increased cost, if any, of maintenance dredging—a form of relief which is claimed for the first time in the pending Petition. (Pet. 22.)

3. Petitioner now advances for the first time a fallacious claim that the 1899 Act did not repeal Section 10 of the 1890 Act. (Pet. 20.)

The 1899 Act expressly repealed "all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act * * *." (App. A hereto, 1a.) In the 1899 Act, Congress reclassified the types of obstructions theretofore covered in Sections 7 and 10 of the 1890 Act, placed in Section 9 of the 1899 Act (33 U. S. C. 401) the types of things for which it desired to require specific congressional consent, placed in Section 10 of the 1899 Act the remaining things covered by Sections 7 and 10 of the 1890 Act and substituted the remedies provided in Section 406 (Sec. 12, 1899 Act) for those provided in Section 10 of the 1890 Act. *Wisconsin v. Illinois*, 278 U. S. 367, 412-3. Under these circumstances there is no room for such an argument. (*Supra*, 8.)

(a) The inconsistency between Section 10 of the 1890 Act and the foregoing Sections of the 1899 Act is necessarily conceded by Petitioner's belated reliance upon a claim that Section 10 of the 1890 Act was not repealed.

(b) The 1897 Report of the Secretary of War to Congress (*supra*, 8) set forth, *first*, a compilation of existing

laws (including Section 10, 1890 Act) and, *second*, a proposed "Act Revising and Enlarging Laws for the Protection of Navigable Waters." (l. c. 2-8, 8-13.) Thus both for 2 years were before Congress for comparison. In no situation could it be clearer that the substantive and remedial changes made by the Congress were intentional and not inadvertent. *Wheeler v. Greene*, 280 U. S. 49, 51.

(c) In 1899 Congress was fully aware that no federal cause of action for removal of an alleged obstruction in a navigable stream lying wholly within a single State existed except when, and to the extent, expressly created by a directly applicable federal statute. (*Supra*, 17.) The congressional selection and provision of remedies for violation of the respective sections of the 1899 Act were deliberately made with full knowledge of the law in that respect.

(d) One purpose of the 1899 Act was to clarify the confusion which had developed from the fact that existing statutes on the subject were "scattered from the beginning of the Revised Statutes through to the end." (32 Cong. Rec. 2296.) Petitioner's argument attributes to Congress an intention to convert the pre-existing statutory confusion into chaos.

4. Petitioner's contention that Section 10 of the 1890 A . was not repealed by the 1899 Act, rests principally, if not wholly, on *United States v. Wishkah Boom Co.* (C. A. 9, 1905), 136 Fed. 42. (Pet. 20.) That action was brought in 1901 to compel defendant to remove a log boom (substantially a wing dam or series of wing dams) which defendant had built prior to passage of the 1899 Act in such a way as to prevent navigation at low tide and seriously obstruct navigation at other times. (l. c. 43, 45.)

The Court noted that the provision of the 1899 Act, which repealed "all laws or parts of laws inconsistent with" Sections 10-20 of that Act, also provided that "no action begun, or right of action accrued, prior to the passage of this Act shall be affected by this repeal," and concluded that (the cause of action having accrued prior to repeal of the 1890 Act) both Acts were operative *"as far as the present case is concerned."* (l. c. 45.) Plainly, the case concerned only the construction and application of Section 10 of the 1890 Act to a pre-existing cause of action and furnishes no support for Petitioner's argument.

The strained and fallacious argument, by which Petitioner seeks to support its erroneous interpretation of the *Wishkah* case (Pet. 20, fn. 11), conveniently ignores the fact that a boom is one of the *structures* specifically regulated by 33 U. S. C. 403 (Section 10, 1899 Act) and that removal of "any structures or parts of structures" erected in violation of Section 403 by injunction is expressly authorized by 33 U. S. C. 406. (Section 12, 1899 Act.)

United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690 (cited Pet. 31) involved the construction of a *dam* in the upper reaches of the Rio Grande River and was brought and decided under Section 10 of the 1890 Act, which expressly authorized relief, by mandatory injunction, to compel removal of such a structure. (l. c. 707, 709; App. B to Pet. 32a-32b.)

5. Petitioner's arguments (Pet. 8, 13, 22) based on *Willamette Bridge Co. v. Hatch*, 125 U. S. 1 (1881); which are inapposite and based upon false factual and legal premises, disingenuously ignore the fact that a bridge is one of the structures specifically regulated by 33 U. S. C. 401 (Sec. 9, 1899 Act) whose removal may be compelled under Section 406 (Sec. 12, 1899 Act).

6. Petitioner's citation of 33 U. S. C. 413 (Sec. 17, 1899 Act) is not explained. (Pet. 2; App. B to Pet. 35a-36a.) No issue relevant to that section has been, or is, raised. Manifestly, however, that section does not vest in Petitioner any cause of action which it does not otherwise have.

II. THERE IS NO CONFLICT OF DECISION.

1. Petitioner's uncertain claim of conflict (Pet. 20) with the 54-year old decision in *United States v. Wishkah Boom Co.*, 136 Fed. 42 (1905) is wholly without substance. (*Supra*, 20-1.)

2. Petitioner's generalized and undocumented assertion that the decision below "is contrary, *at least in principle*, to decisions of this Court and of other courts of appeals," (Pet. 8) does not establish a conflict of decision within the meaning of Rule 19 and, as shown below, there is not even a conflict "in principle."

3. The substantive issue of law presented by the claim against Interlake is sharply restricted by the slender factual basis upon which the claim rests, viz., whether the fact that some of the small amount of non-reclaimable fine materials carried in suspension or unstable solution by Interlake's sewer effluents, which are not less than 99.98% water, settles or deposits after discharge at fortuitous times and places within or without the navigation channel of the Calumet River and in a privately-owned connecting slip, violates Section 403 or Section 407 of the 1899 Act. Assuming *arguendo* that Petitioner had established a violation of either section, the procedural issue presented by the claim against Interlake is whether the specific statutory remedies provided by Congress for a violation of each Section in its comprehensive and detailed regulation of the subject matter are exclusive. The cases cited by Petitioner are plainly inapposite on the facts or the law or both. As to

Sanitary District v. United States, 266 U. S. 405, see *supra*, 16-17.*

4. Petitioner quotes a few words out of context from the opinions in *Sanitary District v. United States*, 266 U. S. 405, 409, and *Wisconsin v. Illinois*, 278 U. S. 367, 405, 412 (Pet. 9, 10) from which it argues that every provision of the 1899 Act must be construed as extending federal control beyond existing law. Examination of the context, from which Petitioner wrenched the words quoted from each opinion, clearly shows that such words were used solely with reference to the fact that, in the 1899 Act, Congress changed the phrase in the 1890 Act reading "not affirmatively authorized *by law*" to read "not affirmatively authorized *by Congress*" with the intent of making "mere state authorization inadequate" **—a change in existing

---

* The following authorities cited by Petitioner are plainly inapposite. (1) *Cotton Oil Ref'g. Corp.*, 281 Fed. 981; *Archer v. Greenville Gravel Co.*, 233 U. S. 60, 65; 1 *Pomeroy, Equity Jurisprudence*, Section 253 (involving common law actions or equitable proceedings between private litigants); (2) *North Bloomfield G. M. Co. v. United States* (1898) 88 Fed. 664 (action specifically authorized by Section 19 of California Debris Commission Act to enforce licensing system for hydraulic mining, 21 Op. Atty. Gen. 10-11); *United States v. Ingram*, 203 F. 2d 91 and *Griffin v. United States*, 168 F. 2d 457 (brought under federal statutes and, in the *Griffin* case, under a right reserved by Government in a lease); *Economy Light & Power Co. v. United States*, 256 U. S. 113 (brought to enjoin construction of a dam in a navigable stream without state authorization or compliance with 33 U. S. C. 401); *New York v. New Jersey*, 256 U. S. 296 (Government intervention where State project involved construction of a tunnel under Newark and New York bays and threatened irreparable damage to Government riparian property); *In Re Debs*, 158 U. S. 564 (involving numerous federal statutes regulating and defining duties of interstate carriers and declaring railroads to be post roads and government property right in the mails while in transit (l. c. 579-81, 583-4). The *Debs* case was cited in the court below in support of the now abandoned claim that Petitioner's officers have inherent sovereign power. On this point compare opinion by same Justice in *Kansas v. Colorado*, 206 U. S. 46, 89-91.

** *United States v. Bellingham Bay Boom Co.*, 72 Fed. 585 (1896), aff'd. 176 U. S. 211.

law not here relevant. The error in this argument is self-evident, and clearly does not establish any conflict of decision.

III. NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED; INSTEAD PETITIONER SEEKS TO PERSUADE THIS COURT TO USURP THE EXCLUSIVE LEGISLATIVE POWERS OF THE CONGRESS.

1. The narrow factual basis for the claim against Interlake (*supra*, 22) restricts the legal issues presented within a very narrow compass and does not present an important question of federal law.

2. Petitioner seeks to conjure an important federal question by supposing wholly dissimilar factual situations which, if they should ever occur, Petitioner asserts would present such a question. Even the abstract questions so suggested are without substance because they are clearly covered by other sections of the 1899 Act which Petitioner conveniently ignores. (*Supra*, 13, 21.) However, this Court does not decide even substantial abstract questions of law which are not presented for decision by a case before it. *Ashwander v. TVA*, 297 U. S. 288, 339-340. An attempt to interject wholly unrelated hypothetical factual situations and legal issues does not convert a correct decision in a single case into an important question of federal law.

United States v. Anchor Oil Corp., et al. (S. D. Cal.) involves wholly different facts and legal issues. (Pet. 7.) The first and principal claim alleged by plaintiff is that the 400 defendant oil companies have deprived, and are increasingly depriving, numerous federal buildings and installations of lateral support by the past and continuing removal of oil and gas from the Wilmington oil field, have caused, and are threatening to cause further, damage to such federally owned properties and seeks damages and

injunctive relief. A second and subordinate claim, which the lower courts may never reach, is that the same facts violate Sections 403 and 408 of 33 U. S. C. Nothing decided by the court below can affect the *Anchor* case which in any event should not, and can not, be decided in this case or unless and until the *Anchor* case comes before this Court after decision by the pertinent lower courts.

3. What Petitioner really seeks to persuade this Court to do, is to usurp the exclusive legislative power of the Congress under the commerce clause by supplying what Petitioner erroneously urges to be omissions in the comprehensive and detailed statutory scheme enacted by the Congress in 1899 for the protection of federal navigable waters. This Court has consistently declined such invitations whether extended by the Government or a private party. *Addison, et al. v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617; *Iselin v. United States*, 270 U. S. 245, 251.

As pointed out by the court below, the balancing of the national interest in the navigation and non-navigation uses of navigable waters presents a difficult problem. (App. A to Pet. 10a-11a.) Probably no other field of federal legislation more imperatively requires the flexibility of the legislative process. Compare *Toolson v. New York Yankees*, 346 U. S. 356, 357. The balancing of the national interests in navigation and non-navigation uses of navigable waters involves a careful appraisal and weighing of those interests and requires different treatment for different classifications of the over-all subject matter and for different situations in the same classification. A congressional committee is cognizant of this litigation. (Pet. 4-5.) If Congress believes that further or different regulations are desirable, it may be assumed that Congress will act.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied as to the separate claims against all Respondents and, *a fortiori*, as to the claim against Respondent Interlake.

Respectfully submitted,

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May 21, 1959.

APPENDIX A.

The relevant part of Section 16 of the Rivers & Harbors Act of March 3, 1899,* 30 Stat. 1121, 1153 (33 U. S. C. 411) provides:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the persons or persons giving information which shall lead to conviction.

The repealing clause of Section 20 of the Rivers & Harbors Act of March 3, 1899, 30 Stat. 1131, 1154, provides:

> That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed: *Provided*, That no action begun, or right of action accrued, prior to the passage of this Act shall be affected by this repeal.

---

* The rest of Section 16 of the 1899 Act is now 33 U. S. C. 412.

APPENDIX B.

Excerpts From Senate Report No. 1686 55th Cong., 3d Sess., February 18, 1899.

* * * * *

Calumet River, Illinois and Indiana

* * * * *

The project for the improvement of this river, adopted by Congress in 1883, contemplated securing a channel 200 feet in width and 16 feet in depth below low water in Lake Michigan, from the mouth of Calumet River at Calumet Harbor, Illinois, to one-half mile east of Hammond, Ind., with a view to increasing the facilities for handling the commerce of this region and also aiding in providing means for the better accommodation of much of the commerce of Chicago River, which river was and still is much crowded.

The original depth in Calumet River varied between 6 and 10 feet.

The project has been modified by the river and harbor act of June 3, 1896, so far as to allow the channel for 2 miles southward from the mouth of the river to be dredged to 20 feet depth.

* * * * *

Since the improvement began in 1889 there has been dredged a channel, measured from the harbor southward, to the full width of 200 feet and depth of 16 feet, 19,518 feet in length, except that over a short portion where rock was encountered the width was reduced to 85 feet, 9,000 cubic yards or less of rock remaining to be removed to secure full width and depth over this short stretch.

Under this 16-foot project 1,767,220 cubic yards material was removed prior to June 30, 1896, from the channel

"below the forks" of the Calumet. In addition there has been removed 248,516 cubic yards of material from the channel between the forks and one-half mile east of Hammond, Ind., in an effort to secure a practicable channel 10 feet deep and 60 feet wide, resulting in failure, due to rapid refilling of channel by slaughterhouse refuse, sewage, and other filth.

* * * * *

Excerpts From House Report No. 1826 55th Cong., 3d Sess., June 24, 1899.

* * * * *

Rivers and Harbors Appropriation Bill.

* * * * *

Section 4 provides that in submitting annual reports of river and harbor works to Congress there shall be included a statement of what deterioration, if any, has taken place by destruction, decay, obstruction, or otherwise, and of the necessary cost of repairing or removing obstructions. Most of the local engineers under present regulations have considered that, however serious the decay in harbor works or the obstructions in channels by shoaling or otherwise, they are not authorized to make a report and estimate the cost without a concurrent resolution by Congress. It has been deemed necessary to change the law in this respect so as to make it the duty of the War Department to present in the annual reports estimates of the cost of properly maintaining river and harbor works already under the control of the Government. Otherwise important channels might become useless by reason of delay in Congressional action.

* * * * *

Excerpts From Senate Report No. 519 53rd Cong., 2d. Sess., July 11, 1894.

* * * * *

Calumet River, Illinois and Indiana.

* * * * *

The total length of channel dredged is 3½ miles. Dredging is now going on.

The annual fill, due to rains and floods in the Calumet River and the waste due to habitation, rapidly reduces the depths secured by dredging in this river, and it seems advisable that the appropriations made by Congress should be distinctly specified, whether intended to prosecute the work or for maintaining depths in the improved section. Without dredging at frequent intervals the improved channel will revert to the original discharge area or capacity.

* * * * *

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FILED
MAY 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~839~~ 56

UNITED STATES OF AMERICA,

Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY AND INTERLAKE IRON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT REPUBLIC STEEL CORPORATION IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 859.

UNITED STATES OF AMERICA,

Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY AND INTERLAKE IRON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT REPUBLIC STEEL CORPORATION IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is reported in 155 F. Supp. 422. The opinion of the Court of Appeals is published in 264 F. 2d 289. No petition for rehearing was filed in the Court of Appeals.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Does the Rivers and Harbors Act of 1899 prohibit the discharge of *water* containing less than one-half of 1% of suspended solids from water outfalls of Republic's plant into the Calumet River?

2. Does water containing less than one-half of 1% of suspended solids flowing from water outfalls of Republic's plant into the Calumet River, a navigable waterway, constitute "the creation of any obstruction", "build or commence the building" of any "structure" or "excavate or fill" "the work", as a matter of law, within the meaning of Sec. 10 of the 1899 statute?

3. Does water discharged from Republic's outfalls containing less than one-half of 1% of suspended solids constitute refuse "flowing from streets and sewers and passing therefrom in a liquid state" within the meaning of Sec. 13 of the 1899 statute?

STATUTES REFERRED TO IN THE AMENDED COMPLAINT.

The statutes referred to in the amended complaint upon which the government predicates liability against Republic are in 33 U. S. C. A., Sections 403 and 407, set forth in the Petition (App. B, pp. 33a-35a). The Petition (p. 2) claims that Section 10 of the Rivers and Harbors Act of September 19, 1890 (26 Stat. 426, 454), and Sec. 17 of the Rivers and Harbors Act of 1899 are involved (Petition, App. B, pp. 32a-36a). Republic contends that the 1890 statute "was repealed by the Act of 1899." (Petition, Opinion of U. S. Court of Appeals, App. A, p. 24a.) 33 U. S. C. A., Section 401 "Historical Note". *U. S. A.* v. *Wilson*, 235 F. 2d 251, 253. The petitioner also contends (p. 2) that Rule 54(c), Fed. R. Civ. P. for United States District Courts is involved. Republic contends that Rule 54(c) has no application to the issues.

STATEMENT.

This action was brought for a mandatory and prohibitory injunction on account of suspended solids in the water outfalls of sewers from the plants of the three defendants emptying into the Calumet River. The trial court granted all of the relief prayed for. The Court of Appeals reversed, remanded and directed that the complaint be dismissed.

Republic Steel Corporation operates an integrated steel producing plant on the east side of the Calumet River at 116th Street and Burley Avenue, Chicago. The north property line of the plant premises begins at approximately Station 150 on the Calumet River. The south property line of the plant premises ends at approximately Station 220. Each station along the Calumet River is 100 feet in length.

The plant property comprises 518 acres. Approximately 4,400 persons are employed in this plant during normal operations. The monthly payroll during normal operations is approximately $2,000,000 (App. 1380).

(All references to "App." in this brief refer to the printed joint appendix, Vol. I to Vol. V, inclusive, as prepared for use in the Court of Appeals and filed in this Court with the Petition.)

During 1952 the plant operated at 87.1% of ingot capacity; 1953, 103%; 1954, 86%; 1955, 103% (App. 1380); 1956-7, 100%; 1958 approximately 40%. During the trial, in 1956, the plant operated at approximately 103% of ingot capacity (App. 1381).

There are five miles of paved roadways and one and one-quarter miles of unpaved roadways within the plant (App. 1430). Approximately 113 surface water catch basins are located along these roadways. Surface water drains into all sewers emptying into the Calumet River (App. 1421). There are 37 miles of railroad tracks on the plant premises (App. 1421).

No sanitary sewers empty into the Calumet River from the plant premises. All sanitary sewers empty into mains of the City of Chicago and of the Metropolitan Sanitary District of Greater Chicago (App. 1398).

The plant purchases approximately 50,000,000 gallons of water from the City of Chicago each month (App. 1397-8). Approximately 15,000,000 gallons of this city water are used for sanitary purposes. The remaining 35,000,000 gallons are used for cooling bearings and other manufacturing purposes. This cooling water empties into the Calumet River through plant sewers.

It is estimated that it takes 18,000 gallons of water to make a ton of ingot iron and that it takes 65,000 gallons of water to convert this ton of iron into steel.

There are two pump houses on the plant premises on the shore of the Calumet River. No. 1 pump located at 118th Street pumps from the Calumet River approximately 400,000,000 gallons per month. No. 2 pump located at 116th Street pumps from the Calumet River approximately 2,100,000,000 gallons per month (App. 1399, 1422). The principal use of this water is for cooling purposes. Approximately 239 tons of solids are pumped into the plant with this Calumet River water each month, 25 tons by pump No. 1 and 214 tons by pump No. 2 (App. 1422).

Substantially all of this water is returned to the Calumet River by seven water outfalls of Republic, as shown in a plat of the drain and storm sewer area, Republic's Exhibit No. 32 (App. 1388-91). The 12" water outfall at Station 172 is for surface water only and does not empty into the Calumet River any water used for cooling or manufacturing purposes (App. 1388).

Defense Plant Corporation, an agency of the United States Government, with Republic as agent, built the facilities now in 1944-5 (App. 1385-87). On March 1, 1947 Re-

public purchased the plant from Defense Plant Corporation.

The principal facilities consist of one battery of coke ovens, one blast furnace with 1,250 tons capacity, four tilting furnaces each with 200 tons capacity and nine electric furnaces each with 80 tons capacity. There are also 44", 36", 32", 21", 12" and 10" mills producing finished steel, a tube mill and a wire mill (App. 1385-6, 1409-10).

Molten iron is manufactured by the blast furnace. This iron is consumed by the electric furnaces in making steel. Approximately 100 to 300 pounds of flue dust result from each ton of iron produced (App. 1408). This flue dust is similar to iron ore. Most of it is reclaimed in a dry type of dust catcher immediately following the blast furnace operation. The dust from this catcher is loaded into gondola cars and transported by railroad from the blast furnace to the sintering plant (App. 1404, 1407-8). This flue dust is then converted into sinter and reused in the blast furnace for the manufacturing of iron (App. 1416-17).

The flue dust not collected by the dust catcher moves to a cleaning device known as a gas washer (App. 1404). This removes 90% to 95% of the remaining flue dust. The gas leaving the gas washer is then carried into precipitators, electrostatic devices, which further clean the remaining flue dust from the gas (App. 1404).

Wash water collects in the bottom of both the gas washer and the two electrostatic precipitators. This water is discharged to a covered flume and travels approximately 800' to the Hardinge thickener (App. 1449-50). (See Appendix, Republic Ex. 33, 37, 38 and 39.) This thickener is 105' in diameter, contains 83,500 cubic feet and has a capacity of 625,000 gallons.

The revolving arm at the base of the thickener carries a series of rakes or vanes set at such an angle that the

solids which settle out are gently pushed toward the center of the compartment (App. 1411-14). The thickened solids which collect are continuously pumped out of the thickener and delivered to a nearby walled open concrete compartment for use by the sintering plant. The retention time of the water in the thickener is approximately three hours (App. 1411-12).

The thickener at Republic is 97% efficient (App. 1415-16). This efficiency is based upon hourly samples taken every day for a period of two years (App. 1454).

The 72" water outfall (No. 7) at Republic is the only outfall carrying water from the thickener to the Calumet River. It is the only outfall in the plant that could contain flue dust.

There are other settling basins at various locations in the plant, one for each mill (App. 1467). These settling basins vary in size from 15' x 15' to 35' deep to 25' x 70' and 40' deep (App. 1468). The overflows from these settling basins discharge into one of five water outfalls (App. 1395).

The retention time for these settling basins varies from 25 minutes to one hour (App. 1447). There are no moving parts in these settling basins. They are simply deep pits with a weir across one end (App. 1447). The mill scale is removed from these settling basins by clam bucket. It is then loaded on railroad cars and sent to the blast furnace for the making of iron (App. 1447-8).

Water is used to cool the rolls in the rolling mills (App. 1470-1). It is also used as a spray water for steel and for carrying away mill scale to the rolling mill settling basins (App. 1467-75).

There are 37 sewer outfalls other than the outfalls of the three defendants which empty into the Calumet River (Govt. Exhibit 6, App. 365-70). No sample for suspended

solids was taken by the Corps of Engineers from any one of these sewer outfalls (App. 429, 590-1, 1190).

The City of Chicago (App. 484, 86-7), the Metropolitan Sanitary District of Greater Chicago (App. 474-5), Commonwealth Edison Company (App. 455, 65, 2038-39), Great Lakes Carbon Company (App. 2038-39), Globe Roofing Products Company (App. 2040), General Chemical Company (App. 2041), Wolf Lake Ditch (Republic Ex. 138, 139, 140, App. 2045), Ford Motor Company (App. 2046) and Allied Chemical Company (App. 2047) have sewer outfalls which enter the Calumet River.

All of these companies, except Commonwealth Edison Company, are located between Stations 105 and 300 (approximately two-thirds of the Calumet River) where Republic is required by the decree to dredge to a depth of 21 feet in the channel. *Evidence presented by Republic is undisputed that all of these companies have suspended solids in their sewer outfalls in substantial concentrations.*

There has been no dredging in the Calumet River from Station 227 to Station 300 since 1945 (Govt. Exhibit 8), when Republic's plant began operations.

No. 1 sewer outfall of Republic is 36″ x 54″; No. 2, 36″ in diameter; No. 3, 60″ in diameter; No. 4, 42″ in diameter; No. 5, 48″ in diameter; No. 6, 12″ in diameter (surface water only); No. 7, 72″ in diameter (Republic Ex. 32, App. 1388-91).

By way of contrast, Commonwealth Edison Company's plant located at 100th Street and the Calumet River, which consumes approximately 2400 tons of coal per day (App. 465), has a sewer outfall from its slag settling pit which discharges into the Calumet River (App. 457). This sewer outfall is 25′ x 12′ (App. 458) and discharges into the Calumet River from 490,000 to 495,000 gallons of water per minute under full plant operation (App. 463). The

force of this volume of water is so great that Commonwealth Edison has constructed a boom in the Calumet River to prevent the sewer outfall from washing away the opposite shore (Republic Ex. 62; App. 2347). There are suspended solids in this sewer outfall (App. 2037-8).

The Calumet River is a shoaling river. There have been decreases in the project depth of the channel of the Calumet River from 106th Street to the mouth of the river (upstream from the plants of the three defendants) to as low as 12′ at the channel line. These shoals have been described by the Corps of Engineers in annual issues of the "Great Lakes Pilot" (Republic Ex. 5, 6, 125; App. 2279, 2283, 2392-3).

Samples of water in Lake Michigan at the entrance to the Calumet River (Republic Ex. 145, App. 2414) and samples of water taken from the channel at 106th Street, north of the plants of the three respondents (Republic Ex. 143, App. 2412), show suspended solids in approximately the same quantities as samples of water taken from the channel of the river at the south property line of Republic's plant (Republic Ex. 146, App. 2414), and south of the plants of the two other respondents.

Petitioner (p. 3), states:

> "Since 1881 the Army Corps of Engineers has maintained the channel in the area here in question at a minimum depth of 21 feet and a width of 200 feet (Fdg. 9, App. 99-100)."

Finding 9 does not support the statement that there has been a channel with a minimum depth of 21 feet and a width of 200 feet *since 1881*. The width of the channel since 1881 has varied from 100 feet to 200 feet and the minimum depth since 1881 has varied from 12, 15, 16, 20 and 21 feet (Republic Ex. 12, Document No. 494, pp. 9, 10, House of Representatives, 72nd Congress, Second Session).

Petitioner (p. 4), states:

> "Prior to 1951 the companies had periodically dredged these industrial solids from the river adjacent to their plants when requested by the United States Army Corps of Engineers * * *."

Government's Exhibit 41 shows that Republic did no dredging in the channel of the Calumet River adjacent to its plant from 1945 until 1951. *There was no joint dredging in the channel of the Calumet River by the three defendants prior to 1951 or subsequent to 1951.*

ARGUMENT.

The Petition should be denied. There are no special and important reasons for granting the Petition. The law of the case is well settled. The opinion of the Court of Appeals is correct and should not be disturbed.

I.

There Is No Decision in Conflict.

Petitioner relies upon Section 10 of the Rivers and Harbors Act of 1890. That statute was not referred to in the complaint or amended complaint. That statute was not relied upon by the petitioner in the trial court or in the Court of Appeals. Petitioner is seeking that which Rule 54(c) does not permit—the recovery on a cause of action different from that on which the complaint is based. *Rosenfield v. Lion Manufacturing Corp.*, 253 F. 2d 90.

The Court of Appeals found that "The Act of 1890 was repealed by the Act of 1899." 264 F. 2d 289, 301. This Court in *Wisconsin v. Illinois*, 278 U. S. 367, 412, stated:

> "The policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890, c. 907; 26 Stat. 426, 454, 455. Sections 9 and 10 were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890. A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890."

If "a new classification" was "substituted for Section 10 of the Act of 1890" it is clear that the Act of 1890 has been repealed. Although this case is referred to in the Petition on pages 10, 11 and 12, the language quoted in this brief, which is decisive, was either overlooked or ignored by petitioner.

The statement in the Petition (p. 8), that "the instant decision * * * is contrary, at least in principle, to decisions of this Court and of other courts of appeals" is misleading, to say the least. In fact, it is erroneous. The decision of the Court of Appeals in the case at bar is in *harmony* with the statement quoted herein from this Court in *Wisconsin v. Illinois.*

The Court of Appeals in *U. S. A. v. Wilson, et al.*, 235 F. 2d 251, 252, stated:

> "We hold that § 10 of the Rivers and Harbors Act of 1890 was repealed by the Act of 1899. Section 20 of the later Act, in its final paragraph, 30 Stat. 1155, provided: 'That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed * * *.' See Historical Note under 33 U. S. C. A. § 415. Sections 10, 12, 15 and 19 of the Act of 1899 *were* inconsistent with § 10 of the 1890 Act."

No petition for rehearing or petition for certiorari was filed by the government in the *Wilson* case.

In referring to the case of *United States v. Wishkaw Boom Company*, 136 F. 42, 9 Cir. the Court in the *Wilson* case further stated:

> "With deference, we think that the court overlooked the fact that the repeal clause covered prior laws which were inconsistent not merely with § 10 of the later Act but, rather, inconsistent with §§ 10 to 20, inclusive, of the later Act. As we have noted, if §§ 10, 12, 15 and 19 of the later Act be read together as they should be, they are inconsistent with § 10 of the earlier Act. By way of editorial comment to 33 U. S. C. A. § 403 it was stated that § 10 of the earlier Act 'was probably omitted from the Code [as indeed it was] as superseded by' § 10 of the 1899 Act. We hold that it was indeed repealed by § 20 of the 1899 Act.
>
> "Thus the problem is resolved to this: Is the Government entitled to an injunction under the later Act?"

In *United States* v. *Wishkaw Boom Company*, 136 F. 42, 45, the Court stated:

> "Section 20 of the act of 1899 repeals only 'all laws or parts of laws inconsistent with the foregoing sections,' and contains the proviso 'that no action begun or right of action accrued prior to the passage of this act shall be affected by this repeal.' It is only necessary to quote the repealing clause to show that both the act of 1890 and that of 1899 are operative, as far as the present case is concerned. The provision of the earlier act prohibiting the maintenance of such obstructions is not inconsistent with the later act prohibiting the erection thereof, and, again, it is evident that a right of action had accrued under the first act prior to the date of the repeal."

Although this case was quoted in the Petition in the case at bar (p. 20), the first sentence quoted herein and the phrase "it is evident that a right of action had accrued under the first act prior to the date of the repeal" were omitted. These omissions mutilate the findings of the court.

The *Wishkaw Boom Company* case is cited by petitioner in an effort to show a decision in conflict and in an effort to revive Section 10 of the 1890 statute. However, the Court in part stated "it is evident that a right of action had accrued under the first act prior to the date of the *repeal*." (Italics ours.) We submit that the Court held that Section 10 of the 1890 Act was *repealed* by Section 20 of the Act of 1899 but that the proviso in Section 20 "that no action begun or right of action accrued prior to the passage of this act shall be affected by this repeal" was applicable in the *Wishkaw* case. The "right of action accrued prior to the passage of" the 1899 Act.

In any event, the *Wishkaw* case does not revive Section 10 of the 1890 statute because this Court has held that "A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890." *Wisconsin* v. *Illinois*, 278 U. S. 367, 412.

Certainly the phrase in the 1890 Act "That the creation of any obstruction not affirmatively authorized by *law* * * *" is "inconsistent" with the phrase in the 1899 Act "That the creation of any obstruction not affirmatively authorized by *Congress* * * *" (Italics ours).

In *U. S. v. Bellingham Bay Boom Company*, 176 U. S. 211, 214, the government contended that "authorized by law" in Section 10 of the 1890 Act should be construed to mean "authorized by Congress". This Court held such construction to be error. In Section 403 of the 1899 statute Congress changed "authorized by law" to "authorized by Congress".

In *Wisconsin v. Illinois*, 278 U. S. 367, this Court (p. 412) stated:

> "A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890. The latter provided that the creation of any obstruction to navigable capacity was prohibited, unless 'affirmatively authorized by law' and this was changed so as to read 'affirmatively authorized by Congress.' The change in the words of the first clause of Section 10 was intended to make mere State authorization inadequate."

Section 9 of the 1899 Act (33 U. S. C. A. 401) in part provides:

> "It shall not be lawful to *construct or commence the construction* of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until *the consent of Congress to the building of such structures* shall have been obtained and until *the plans for the same* shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army." (Italics ours.)

Thus, in accordance with the reasoning of this Court in *Wisconsin v. Illinois*, 278 U. S. 367, 412, hereinabove

quoted, the first clause in Section 10 of the 1899 Act—"the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited"—and in particular the words "*any obstruction*" refer to the construction of "any bridge, dam, dike or causeway * * *" etc., described in Section 9 (Section 401) of the 1899 Act. "Obstruction" in the first clause of Section 403 does not refer to suspended solids in the water outfalls of Republic and their accumulation in the channel of the Calumet River, as claimed by petitioner. Nor is Republic required to obtain an Act of Congress to have its water outfalls empty into the Calumet River. "The creation of any obstruction" in the first clause of Section 403, refers to something created by construction in accordance with plans and specifications—not to suspended solids in water outfalls of Republic. By Sections 403 and 401 Congress reserved for approval by Congress certain types of construction to be built (created) in navigable waters.

This was the construction placed upon a similar provision in the 1890 Act—"that the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, * * * is hereby prohibited." The Court in *U. S.* v. *Burns*, 54 F. 351, 363 stated:

> "I think that the obstructions contemplated by the tenth section—those that have not been affirmatively authorized by law, and are therefore prohibited—*are such obstructions as are permanent in their nature, as are created for special purposes, by the usual modes of construction.*" (Italics ours.)

No petition for certiorari was filed by the government in the *Burns* case. The decision of the Court of Appeals in the case at bar cites the *Burns* case with approval, 264 F. 2d 289, 296.

In like manner the omission in Section 12 of the 1899

statute, 33 U. S. C. A., Section 406, to provide for the removal of any *obstruction* by injunction is "inconsistent" with the provisions of the 1890 Act.

The law is clear that Section 10 of the 1890 statute has been repealed. This Court has so held in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412. In accord are *U. S. A.* v. *Wilson, et al.*, 235 F. 2d 251, 252, and the decision of the Court of Appeals in the case at bar, 264 F. 2d 289, 301. There is no decision to the contrary. Therefore, there is no conflict of decision on this point.

A.

Congress, by the 1899 Act, Has Deprived Federal Courts of the Power to Remove "Obstructions" by Injunction. Suspended Solids of Republic Are Not "Structures".

The repeal of Section 10 of the Act of 1890 had important consequences. Congress took away from the jurisdiction of Federal Courts the power to remove *by injunction unlawful "obstructions"*. The following language in Section 10 of the 1890 Act was *repealed* by Congress in 1899:

> "* * * the creating or continuing of any unlawful *obstruction* in this act mentioned may be prevented and such *obstruction* may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such *obstruction* may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States." (Italics ours.)

By Section 406 of the 1899 Act, Congress limited the jurisdiction of Federal Courts by injunction to the removal of "*structures*" erected in violation of Sections 401, 403 and 404. Consequently, Section 406 does not give petitioner the right to obtain the removal of any "*obstruction*" by injunction. No other law gives petitioner such a right. There must be a statute passed by Congress giving peti-

tioner such a right if petitioner seeks to exercise such a right. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *U. S.* v. *Bellingham Bay Boom Company*, 176 U. S. 211, 217; *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U. S. 406, 412. There is no such statute.

The Petition (p. 12) refers to "a backwards process of reasoning" whereby the Court of Appeals in the case at bar "read the prohibition against 'any obstruction not affirmatively authorized by Congress' out of the statute." In footnote 6 (p. 12) the Petition refers to the statement of the Court of Appeals as "erroneous". The Petition omitted to refer to this Court the language in support of the construction quoted in the opinion of the Court of Appeals (p. 297) from this Court's opinion in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412, as follows:

> "The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. *Congress, having stated in Section 9 as to what particular structures its specific consent should be required*, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. *If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress.* We do not think this was intended." (Italics ours.)

What the Petition really seeks in the case at bar is that *Wisconsin* v. *Illinois* should be overruled or that this Court, by skillfully skirting some of the language of *Wisconsin* v. *Illinois*, as did the petitioner, should repeal what heretofore has been considered to be good law.

There is no decision in conflict on this point.

The petitioner does not contend that there has been a violation of the second clause of Section 403—"and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures * * *" etc.

The petitioner does contend, however, that Republic has violated the third clause of Section 403. The petitioner (p. 13) argues "It is the introduction of solids which, while transported by the water, operate to fill in the channel, which is the cause of the *obstruction.*" (Italics ours.)

We have heretofore pointed out that Section 406, which is the only section providing for an injunction for the violation of the provisions of Section 403, authorizes an *injunction only* for "the removal of any structures or parts of structures." Suspended solids of Republic do not constitute "*structures*".

Section 406 does not authorize an injunction for the removal of an *obstruction. No other law passed by Congress authorizes an injunction for the removal of an "obstruction".* Therefore, assuming that the third clause of Section 403 is violated by the creation of an *obstruction, there is no remedy for injunction.*

As the Court stated in the *Wilson* case:

> "Section 12, 33 U. S. C. A. § 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by § 10, 33 U. S. C. A. § 403. This construction, which we think required by the plain language of the Act and its context, is corroborated by the strong intimations of §§ 15 and 19, 33 U. S. C. A. §§ 409 and 414. Since the injunctive powers conferred by § 12 are limited to the removal of structures violating §§ 9, 10 and 11, clearly they do not extend to violations of §§ 15 and 19."

Even if Congress had passed some law permitting the United States to obtain an injunction to remove unlawful obstructions described in the third clause of Section 403, the water outfalls of Republic do not violate the third clause. That clause makes it unlawful "to excavate or fill" the areas described, "unless *the work* has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." (Italics ours.)

"To excavate or fill" refers to a planned project or planned reclamation of part of submerged land. "Work" refers to "works of improvement for the benefit of navigation."

The Federal Flood Control Act refers to "works of improvement of rivers and harbors," "works of improvement relating to flood control," "works and projects relating to flood control," "works or projects of navigation," "works of improvement, for navigation or flood control," "the authorization and construction of navigation works," "works of improvement for navigation or flood control," "plans for the construction and operation of the proposed works with other plans," and "the use for navigation, in connection with the operation and maintenance of such works herein authorized for construction." 33 U. S. C. A. 701, 701-1.

Suspended solids in Republic's water outfalls which may enter the channel of the Calumet River do not constitute the "work" or a "project" within the third clause of Section 403.

There is no conflict of decision on this point.

B.

The Anchor Oil Corporation Complaint Is No Decision in Conflict.

The first case referred to by the government in its Petition (p. 7) is *U. S.* v. *Anchor Oil Corporation, et al.*, (U. S. D. C., S. D., Cal.). The *complaint* in this case was filed August 28, 1958 against Anchor Oil Corporation and 400 other oil companies, oil syndicates, the State of California, the City of Los Angeles and the City of Long Beach.

The first cause of action in the complaint (19 pages) refers to subsidence in the Long Beach Naval Shipyard and other federal properties at Long Beach, California, in which the government "owns the fee title to the real property," because of the removal of oil and gas from an oil field at Wilmington, California. The complaint prays for "unitized field-wide repressuring operations as may be necessary to reduce and ultimately prevent further subsidence of the surface above the Wilmington Oil Field."

The second cause of action in the *complaint* alleged a violation of Section 10 of the Rivers and Harbors Act of 1899 (33 U. S. C. A. § 403), a violation of Section 14 of the Rivers and Harbors Act of 1899 (33 U. S. C. A. § 408) and sought a mandatory injunction requiring the defendants to submit to the court "for approval a plan or plans for field-wide unitized repressuring that will be reasonably designed to halt, as promptly as practical, further subsidence of the land above the Wilmington Oil Field * * *" and for damages.

The reference to Section 408 in this complaint relates to the injury to harbor or river improvements owned or under the control of the United States and is set forth in the appendix to this brief (Exhibit A). That section alone, apart from 403, could permit recovery by the government.

There is no reference in the *complaint* to the 1890 statute referred to in this brief.

We respectfully submit that a reference to Section 403 of the 1899 statutes in a complaint filed in the District Court wherein there has been no trial of issues does not comply with Rule 19 of this Court with respect to considerations governing review on certiorari.

Furthermore, the issues in the *Anchor Oil Corporation* case presently are moot. In accordance with an order entered in that case on March 10, 1959, *ex parte* at the request of the government attorneys (Exhibit B attached to this brief), the issues are temporarily suspended.

Finally, the statement in the Petition (p. 7) that "The narrow interpretation given to the 1899 Act by the court below, if followed, would raise grave doubts as to the validity of that cause of action" is incorrect as a matter of law. This reason for granting the Petition is not only wholly unjustified but also is altogether premature and misleading.

C.

The Provisions of Section 407 Do Not Apply to Republic's Water Outfalls.

Petitioner also contends *inter alia* that Section 407 applies to Republic's water outfalls. Republic contends that Section 407 *specifically excepts* these water outfalls.

Section 407 is a specific statute and refers to "refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." Section 407 eliminates Section 403.

In *Fourco Glass Co. v. Transmirra Corp.*, 353 U. S. 222, 228, this Court stated:

> "In these circumstances the law is settled that 'However inclusive may be the general language of a stat-

ute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.' *MacEvoy Co. v. United States*, 322 U. S. 102, 107."

An expert witness for Republic testified that from his *personal experience state regulatory agencies and interstate compact agencies consider solids in water outfalls similar to Republic to be in a liquid state* (App. 2101). He also testified that the percentage of water in the water outfalls of Republic is in excess of 99.9% (App. 2101). Suspended solids are less than 1 part in 1000.

As previously noted in the "statement" in this brief, Republic's plant comprises 518 acres, has 5 miles of paved roadways and 11 miles of unpaved roadways within the plant and approximately 113 surface water catch basins located along these roadways. Surface water drains into Republic's water outfalls emptying into the Calumet River (App. 1421). Republic is not required by law to purify this surface water after rainfalls or to purify the Calumet River.

Republic contends that if there is any refuse in its water outfalls emptying into the Calumet River, the refuse is "that *flowing* from streets and sewers and passing therefrom in a liquid state" (Italics ours), within the exception to Section 407. If the plain meaning of the exception in Section 407 does not apply to Republic's water outfalls, then the exception has no meaning whatsoever.

Section 411, which relates to the illegal deposit of refuse in Section 407, does not provide any remedy by *injunction* to remove such illegal deposits. "There must be a statute passed by Congress giving petitioner such a right if peti-

tioner seeks to exercise such a right." *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *U. S. v. Bellingham Bay Boom Company*, 176 U. S. 211, 217; *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U. S. 406, 412.

There is no conflict of decision on this point.

II.

THE COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

There are many laws passed by Congress relating to navigation and navigable waters. These various laws and, in particular, the Federal Water Pollution Control Act, Section 466-466k, are set forth in 33 U. S. C. A.

In addition, there are 20 interstate compacts approved by Congress and 12 "unperfected" interstate compacts relating to navigable waters and pollution—"Documents on the Use and Control of the Waters of Interstate and International Streams—Compacts, Treaties and Adjudications—United States Department of the Interior, 1956."

Furthermore, there are laws in every state relating to navigation and pollution. There is no important question of federal law which should be settled by *this Court*. If there has been an omission by Congress in the 1899 statutes, the omission should be cured by Congress and not by this Court.

The failure of Congress to act cannot be cured by certiorari. Certiorari should not be granted merely because the District Court was reversed. There is absent here a legal controversy of importance. This Court should not become "a third legislative chamber", in the words of Judge Hand. The Petition in the case at bar should be

denied. The omissions in the 1899 statutes should be cured by Congress and not by this Court.

Respectfully submitted,

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